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The decision of the case of State v. Union & Planters' Bank, by the Supreme Court of Tennessee, construes a provision of some of the bank charters of that State, prescribing the amount of tax to which such corporation shall be liable. The holding, exactly stated, is that a provision in a bank charter, that the corporation shall pay "a tax of one-half of one per cent. on each share of stock subscribed, which shall be in lieu of all other taxes," exempts the bank from any license or privilege tax, and also exempts the shares from taxation in the hands of the individual shareholder. The court, it will be seen, decides in favor of the banks, but does so only because bound by the decisions of the Supreme Court of the United States in the case of other Tennessee banks. This is only one of a great number of instances of the diversity of views that various courts have held on the subject of bank taxation. One of the questions most discussed when the National Bank Act was passed, was that of State taxation of such banks. The friends of the system saw clearly that if the States were permitted to tax the national banks as they saw fit, such banks would soon be taxed out of existence. And in many of the old bank charters there were provisions such as those in the charters of the Tennessee banks above referred to, intended for the protection of the banks against subsequent hostile legislation.

We have heretofore made mention of the report of the committee on international law, submitted at the recent meeting of the American Bar Association, in which they declare it to be unnecessary and inexpedient that there should be any legislation by congress to give to the federal courts jurisdiction of crimes against the person and property of aliens in any case in which such jurisdiction does not exist as to similar cases in which a citizen is the injured party. The committee urge, in taking the position against legislation of the kind suggested, that outrages equally shocking as that of 1891 at New Orleans, have occurred in the past without suggesting any necessity for interfering with the powers of the States to punish crime; that in more than a century, only seven cases have occurred to which, by any possibility, this legislation could apply; that two of these were in territories in practical control of the federal government; that the suggestion of this legislation has not come in any case from a foreign power with whom we are in treaty relations, and that the demands pressed upon the United States government have been almost uniformly, not so much for the punishment of the assailants as for pecuniary indemnity which the injured parties had already the right to seek in the United States courts; that our government has uniformly rested upon the common law principle that the punishment of crime must be left to the ordinary and orderly administration of justice by the courts under the constitution and laws and through State courts, in like manner as in similar cases affecting our own citizens; that upon this basis all complaints arising out of such cases have been settled through the ordinary diplomatic channels and without any loss of self-respect to our government; and that the method of dealing with such cases in England, the other great common law country, is precisely analogous to our own.

In reference to these objections, a well-considered article in a recent number of *Bradstreet's*, says in the first place, that the fact that similar cases have occurred without suggesting the necessity for the legislation proposed, can have little bearing on the question, since the desirability of the legislation has now been suggested, and the fact that the suggestion has not come from a foreign power with whom we are in treaty relations is not material, the value or pertinence of the suggestion, not the source of it, being the point to be considered; and that, furthermore, the example of England is not in point, for the reason that England is a completely national State, while the United States retains the federal form and legislation made necessary to give a federal government jurisdiction over matters about which there can be no question in a national State.

Attention is also called to the fact that the committee, while expressing the opinion that there are, to say the least, grave doubts of the constitutionality of legislation of the

kind proposed, does not go into any extended discussion of this point. The writer thinks that the report would be more interesting if it did, and expresses the opinion that everybody does not discover the constitutional difficulties which the committee seems to. Upon this point the article concludes as follows:

> The constitution confers upon congress the power to "define and punish offenses against the law of nations" —article 1, section 8. Under this provision it would seem clear that congress has power to provide for the prosecution of such offenses by giving the federal courts jurisdiction of them, especially since in section 11 of article 3 the constitution declares that the judicial power shall extend to all cases arising under treaties, and to controversies between a State or its citizens and foreign States, citizens or subjects. It is essential also to the conception of a full exercise of the power to punish such offenses that congress should have power to authorize federal officials to set the machinery of the courts in motion, and to provide penalties for offenses of the kind in question. Furthermore, it has been held by the Supreme Court of the United States that every national government, and in that class the United States government is declared to be included, is required by the law of nations to use due diligence to prevent a wrong being done within its own dominion to another nation with which it is at peace or to the people thereof. In the face of these provisions and declarations the constitutional difficulties which seem to have suggested themselves to the bar association committee can hardly be regarded as weighty.

NOTES OF RECENT DECISIONS.

PRINCIPAL AND AGENT—FRAUDULENT REPRESENTATIONS OF AGENT—MERCANTILE AGENCY.—The case of City Nat. Bank v. Dun, decided by the United States Circuit Court, Southern District of New York, presents some new and interesting questions. There defendants, constituting a mercantile agency, agreed to furnish plaintiff, through its subagents, information concerning the mercantile standing and credit of merchants; defendants not to be responsible for the negligence of its agents in procuring information, and not guarantying the correctness thereof. Defendants' agent, in reply to their call, knowingly gave false information concerning the standing of a merchant with intent to mislead plaintiff and benefit said merchant, and sustained loss thereby. It was held that defendants were liable, the agent's action being within the scope of his authority, and for and upon the business of the defendants. The proposition of law was laid down that a principal is liable for the fraud and deceit of his agent which was committed for the principal in the course of and as a part of the agent's employment, and within the scope of his authority, though the principal did not in fact authorize the practice of such an act. Shipman, Circuit Judge, says:

> The defendant's argument upon the motion for a new trial was directed to two propositions, the first of which is that an innocent principal is not liable in an action of deceit for the fraudulent representations of an agent, although the principal, in ignorance of the fraud, receives and retains the fruits of it. It is not denied that, if suit is brought by the principal to enforce the contract, the fraud is a defense, and that, if the deceived person institutes a suit to rescind the contract on that ground, the misrepresentations are imputable to the principal, because it is inequitable that he should retain the fruits of fraud; but it is claimed that an action of deceit cannot lie in favor of the injured party against an innocent principal. It must be universally conceded that the language of the text writers, the *dicta* of the early English cases, and the decisions of the courts of high authority in this country were in favor of the principle that a principal is civilly liable for the fraud and deceit of his agent which was committed for the principal, in the course of and as a part of the agent's employment, and within the scope of his authority, though in fact the principal did not authorize the practice of such an act. Story Ag. §§ 139, 452; 1 Pars. Cont. 62; Locke v. Stearns, 1 Metc. (Mass.) 560; Olmsted v. Hotailing, 1 Hill, 317; White v. Sawyer, 16 Gray, 586; Bennett v. Judson, 21 N. Y. 238; Hern v. Nichols, 1 Salk. 289; Wilson v. Fuller, 3 Q. B. 68; Ormrod v. Huth, 14 Mees. & W. 651; Murray v. Mann, 2 Exch. 538.
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> But it is said by the defendant that later English cases, and a well-considered modern case in New Jersey, have denied that an action of deceit would lie against an innocent principal; and the cases of Udell v. Atherton, 7 Hurl. & N. 170; Bank v. Addie, L. R. 1 H. L. Sc. 146; and Kennedy v. McKay, 43 N. J. Law, 288,—are cited. An examination of each of those cases shows that the old doctrine was not denied that the principal is liable whenever his agent, who is, at the time, acting within the scope of his authority and for the principal, makes a fraudulent misrepresentation which influences and is acted upon by the plaintiff to his injury, but that the case turned upon the question whether the alleged agent was, under the circumstances in each case, acting within the scope of authority. Udell v. Atherton was tried at *nisi prius* by Baron Martin, who nonsuited the plaintiff. A commission merchant sold for the innocent defendant to the plaintiff a log of mahogany, the soundness of which the commission merchant fraudulently represented, knowing the untruthfulness of his assertion. The appellate court was equally divided, two judges holding that the defendant was liable, inasmuch as he had received and retained the fruits of the fraud, and two judges holding that he was not liable. It is apparent from the opinion of the two (Martin and Bramwell) who were in favor of the defendant that the case depended in their minds upon the fact, which they deemed to have existed, that the selling agent was not in fact authorized to make the representation, and that his situation before the buyer or the public was not such as to bring the representation he made within the scope of his authority. Baron Martin said

tersely: "The true rule is that, whenever an agent acting within the scope of his authority makes a fraudulent misrepresentation, his principal is liable." The case of Kennedy v. McKay, in 43 N. J. Law, 288, also turned upon the fact that the alleged agents were without authority to make representations, and exceeded the manifest scope of their authority in so doing. The case of Addie v. Bank was, in brief as follows: Addie bought of the bank 135 shares of its stock, induced thereto by false and fraudulent annual statements of its directors to the shareholders, and by the fraud of the manager, who falsely caused an agent of the bank to represent to Addie that a purchase would be a good investment. The bank became insolvent, went into liquidation, and Addie presented his claim against the bank to recover the damages arising from the fraud. It is true that there are *dicta* of the judges who gave the chief opinions in the house of lords, which assert the doctrine of the present defendants, and which, not taken in connection with the facts of the case or with other portions of the opinions, justify the reliance which is placed upon them by the defendants' counsel; but an examination of the whole case shows that one of the decisive facts upon which it hinged was the lack of implied authority in the directors to make representations upon which a sale could be based. This sufficiently appears from Lord Chelmsford's statement of the true ground upon which a corporation can be held liable for the statements of its directors. It will thus be seen that the cases upon which reliance is placed show nothing more than a disposition on the part of English judges to demand that, when an innocent principal is made liable, it shall clearly appear that the fraudulent agent was not acting outside the known scope and power of his agency. But the question was re-examined, in the light of the Addie Case, in Mackay v. Bank, L. R. 5 P. C. 394,—a case in which no doubts of the extent of the agency existed,—and it was held, without hesitation, that "in an action of deceit, whether against a person or company, the fraud of the agent may be treated, for the purposes of pleading, as the fraud of the principal," and the language of Lord Willes, in Barwick v. Bank, L. R. 2 Exch. 259, is approved:

"The master is answerable for every such [fraudulent] wrong of his servant or agent as is committed in the course of his service and for the master's benefit, though no express command or privity of the master be proved."

The defendants' second point is that they are not liable, because the motive which induced the agent to commit the fraud was a desire to benefit Kitts, and that an "innocent principal is not liable where the agent made the fraudulent representations which produced the injury, not for the employer, but for his own interest and to serve his private ends." This form of statement is another manifestation of the strictness with which some of the English courts require that the agent must be acting for the principal and within the scope of his authority in making the representations, and, if he is committing the fraud for his individual ends, he cannot be considered, under their decisions, as acting for the principal, although his statements related to matters about which he was authorized to give answers. Whether the same conclusion would be reached by the courts of this country is a point which I do not intend to consider. The facts in the case of British Mut. Banking Co. v. Charnwood Forest Ry. Co., L. R. 18 Q. B. 714, which the defendants cite, clearly illustrate the nature of the cases to which the proposition applies. Customers of the plaintiffs applied to them for a loan on the security of transfers of the debenture stock of the defendant company. The plaintiffs' manager asked the defendant's secretary, who said that the transfers were valid and the stock existed. The plaintiffs made the advances. The secretary and one Maddison had fraudulently issued certificates for debenture stock, and these transfers related to a part of this overissue. Plaintiffs lost their security. The false statements were made in the interest of the secretary and Maddison. The court held that the secretary was held out as a person to answer such questions as were put to him on behalf of or for his employees, but when, in answering inquiries put by third persons, he made statements in his own interest or to assist his friend, and not on the bank's account, he was not acting for the defendants. But it must be clearly understood, as is laid down by Lord Esher in the same case, that the language of the books, which speaks of acts or representations of the agent "in the interest of the principal" or "for the benefit of the principal," is not limited to acts which result in the pecuniary benefit of the principal. This language is "equivalent to saying that he must act" for "the principal, since, if there is authority to do the act, it does not matter if the principal is benefited by it."

MARRIAGE—VALIDITY.—The case of *In re* McLaughlin's Estate, 30 Pac. Rep. 651, decided by the Supreme Court of Washington, contains an interesting discussion of the question as to the validity of a common law marriage, and an exhaustive review of the conclusions of the courts of the various States upon the subject. Gen. Stat. Washington, §§ 1381-1389, relating to marriages, provide that certain persons are authorized to perform the marriage ceremony, and, if it be performed before an unauthorized person, the validity thereof shall not be questioned, if such marriage be consummated with a belief of either of the persons so married that it was lawful; that "all marriages to which there are no legal impediments, solemnized before or in any religious organization or congregation, according to the established ritual or form commonly practiced therein, are valid;" that a license shall be procured before any persons can be joined as husband and wife, and should one be a girl under the age of 18 years, or a boy under 21 years of age, the license shall not issue except on the consent of the parent or guardian. It was held the intent of the statute is to prohibit marriages not entered into in the manner therein prescribed, and a common law marriage is void. We select the following from the very long opinion of the court:

The position taken by the appellant, however, is directly sustained in the case of Beverlin v. Beverlin, 29 W. Va. 732, 3 S. E. Rep. 36, in which State marriages at the common law were held to be abrogated; and

the decision was put upon this very ground, that the legislature had provided a method for contracting the marriage relationship, and had specially excepted those cases and declared them valid, notwithstanding the ceremony was performed by some person not authorized as by law required. In that case, Snyder, J., says: "There is much controversy as to what constitutes a common law marriage. It has always been and still is a doubtful question in England. In the American States where such marriages have been recognized and held valid, there is considerable diversity as to their requisites. In North Carolina, Tennessee, Massachusetts, Maine, and Maryland, some ceremony or celebration seems to be necessary to a valid common law marriage, and in most or all of these States it has been questioned whether or not the statutes have not superseded common law marriages, and that a marriage, to be valid, must be in accordance with the statutes. . . . In New York it has been held that no religious form or ceremony of any kind is essential to the validity of the marriage; all that is required in that State is that the parties should be capable of contracting, and that they should actually contract, to be man and wife. . . . In Pennsylvania it has been decided that 'marriage is in law a civil contract, not requiring any particular form of solemnization before the officers of church or State, but must be evidenced by words in the present tense, uttered for the purpose of establishing the relation of husband and wife, and should be proved by the signature of the parties or by witnesses present, when made; therefore, when the evidence of the contract was the declaration of the wife, that "about 31 years ago she went to the house of A. S. to live and keep house for him under a mutual promise and agreement that they would sustain towards each other the relation of husband and wife, and that they did thus live and cohabit together," it was held that there was not proof of a marriage in fact.'" But stating that it was unnecessary to consider the evidence in said case, the court said: "We think our statute has wholly superseded the common law, and in effect, if not in express terms, renders invalid all attempted marriages contracted in this State which have not been solemnized in substantial compliance with its provisions. The statute in force in this State in 1873, when it is alleged the marriage now in question occurred, is embraced in chapter 63 of our Code of 1868. The first section of said chapter provides for the issuance of marriage licenses, the third, fourth, and fifth sections by whom and the manner in which marriages may be solemnized, and the sixth section is as follows: 'Every marriage in this State shall be under a license, and solemnized in the manner herein provided; but no marriage solemnized by any person professing to be authorized to solemnize the same shall be deemed or adjudged to be void, nor shall the validity thereof be in any way affected, on account of any want of authority in such person, if the marriage be in all other respects lawful, and be consummated with a full belief on the part of such persons so married, or either of them, that they had been lawfully joined in marriage; nor shall any marriage be celebrated within this State between the 17th day of April, 1861, and the 1st day of January, 1866, be void by reason of the same having been solemnized without such license.'" After stating that the marriage is a natural right, which existed independent of statutes, and that ordinarily the statutory provisions regulating the contract of marriage should be held to be directory; that the general rule is that a marriage good at common law is valid notwithstanding the existence of any statute on the subject, unless the statute contains express words of nullity; but adding, however, that this rule is not universal (1 Bish. Mar. & Div. § 283),—the court further said: "It seems to me, therefore, that when the terms of the statute are such that they cannot be effective to the extent of giving each and all of them some reasonable operation without interpreting the statute as mandatory, then such interpretation should be given to it. The statute under consideration, in express words, declares that 'every marriage in this State shall be under a license, and be solemnized in the manner herein provided.' It is impossible that these words, standing alone, should, under the general rule just stated, be interpreted is merely directory. But the statute does not stop here. It qualified these words by provisions which would be wholly useless and unnecessary, if it were intended and should be held that the preceding provisions are simply directory. It is declared that certain marriages shall not 'be deemed or adjudged void' because the persons solemnizing them did not in fact have authority to do so. It also declares that certain other marriages shall not be void because they were solemnized without a license. These exceptions or qualifying provisions seem to me to be equivalent to an express declaration that marriage had in this State, contrary to the commands of the statute, and not saved by the exceptions, shall be treated as void. It is apparent that the legislature must have interpreted the statute as making the excepted marriages null and void without the excepting clauses, for otherwise the exceptions would be useless, and would not have been made."

In Com. v. Munson, 127 Mass. 466, it is stated: "Under all changes in the form of the statutes, it has always been assumed in this commonwealth, and in the State of Maine, which was originally a part thereof, that (except in the single case of Quakers or Friends, whose marriages are made valid by a special provision limited to that sect, and, though not solemnized by any magistrate or minister, or witnessed, recorded, and returned by the principal officer of the meeting at which the ceremony is performed) a marriage which is shown not to have been solemnized before any third person, acting or believed by either of the parties to be acting as a magistrate or minister, is not lawful or valid for any purpose." And in Norcross v. Norcross, a late Massachusetts case, decided in January, 1892, to be found in 29 N. E. Rep. 506, it was said: "According to the law of New Hampshire, as declared in Dunbarton v. Franklin, 19 N. H. 257, if parties enter into a contract of marriage between themselves, and live together in accordance with it, such facts do not constitute a marriage. We are referred to no statute or decision which shows that the law of that State has since been changed. The finding that there was no marriage under the laws of New Hampshire was therefore well warranted. The law of Massachusetts is similar, and there was nothing to show any formal ceremony of marriage here." In that case there seems to have been some proof that no marriage ceremony was ever performed between the parties. They had cohabited as husband and wife in Massachusetts and New Hampshire, where common-law marriages are not allowed; they went to New York and continued in the same apparent relation as husband and wife, at one time for three days, and another time for one week, where marriages at the common law are held valid; but this was held to be insufficient, under the circumstances, to establish the relationship, there being no evidence that the parties while in New York entered into any contract of marriage between themselves. In Holmes v. Holmes, 1

Abb. (U. S.) 525, Deady, J., says: "The consent to become husband and wife—the contract out of which arises the relation—must be given as herein prescribed,—before a person authorized to solemnize marriage, and in the presence of two witnesses. Without the observance of these formalities, the marriage relation, it seems to me, cannot be created within the States of Oregon and California, particularly the former. Neither ought it to be. To prevent fraud and litigation, the law wisely requires certain contracts to be in writing, and signed by the parties. A single rood of land cannot be conveyed except by the deed of the vendor. How much more important it is to society and individuals that the contract upon which rests the marriage relation, the most important of all others, should not be made except with such attending circumstances and formalities as will serve to manifest the consent of the parties beyond question, and also preserve the evidence of it. · · · Nor do I think that citizens of this State can purposely go beyond its jurisdiction, and not within the jurisdiction of another State,—as at sea,—and there contract marriage contrary to its laws. Such an attempt to be joined in marriage is a fraudulent evasion of the laws to which the citizens of the State is subject and owes obedience, and ought not to be held valid by them." In Denison v. Denison, 35 Md. 372, Alvey, J., says: "By the canon law of Europe, founded mainly upon the Roman civil law, prior to the Council of Trent, in the sixteenth century, the contract of marriage was regarded as simply of a consensual nature, only differing from other contracts in its being indissoluble even by the consent of the parties. In form, a contract *per verba de præsenti* or a promise *per verba de futuro cum copula*, constituted a valid marriage, without the offices of a priest, till the decrees of the Council of Trent, which required the intervention of the parish priest to give validity to the marriage. The promise *per verba de futuro*, when followed by carnal intercourse, was considered as equivalent in legal effect to the contract *per verba de præsenti*. In the matrimonial law, as administered by the canonist, it was a maxim, *consensus non concubitus facit nuptias;* and this remains the law to the present day in some parts of Europe, where the civil and cannon law prevail, and where the decrees of the Council of Trent have not been accepted,—as in Scotland."

The American doctrine undoubtedly is that the relation of husband and wife originates in contract. In most of the States, and in our own, it is so declared by statute. This contract, unlike all others, is indissoluble at the will of the parties. At common law it may be entered into by persons of proper age and mental capacity by a mutual agreement or understanding. This seems to be the general doctrine, although in some of the States a ceremony of some kind is held to be necessary, even though common-law marriages are recognized. There is a considerable conflict in the authorities as to the acts which are necessary to establish a common-law marriage, some courts even going to the extent of holding that continued cohabitation alone is sufficient, while others hold that there must have been a contract between the parties, and others to the still further extent that this must have been evidenced by some kind of a ceremony, or, at least, a declaration to that effect in the presence of other parties.

INTERPRETATION OF AMBIGUOUS JUDGMENT RENDERED BY THE COURTS OF A SISTER STATE.

Article 4 of the constitution of the United States provides that, "Full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State." This is sometimes taken to mean that the decree or judgment of a court in one State shall have in all respects the same force and effect in any other State where the judgment is sought to be enforced; and Mr. Justice Swayne, in Cheever v. Wilson,[1] says "the constitution and laws of the United States give the decree the same effect elsewhere which it had in Indiana." This would seem to be, however, a somewhat loose statement of the constitutional provision. While full faith and credit must, under the constitution, be given in every State to the judgments and decrees of the courts of all other States, this does not mean that such judgment or decree shall have in all respects the same "force and effect" in the other States that it had in the State in which the judgment was rendered. In other words, if a judgment is obtained in Indiana, and suit is brought on it in Ohio, the Ohio court must give full faith and credit to the Indiana court's proceedings, to the extent of rendering judgment against the judgment debtor in the Indiana court, in accordance with the terms of that judgment; but the force and effect of the Indiana judgment thus rendered binding in Ohio, is determined and fixed, not in accordance with the right of the judgment creditor as fixed by the laws of Indiana, but in accordance with the laws of Ohio. Thus, a judgment obtained in Indiana, and that had certain force and effect in accordance with the laws of that State, might, when established as a binding judgment in Ohio, under the laws of Ohio in reference to limitation of the effect of a judgment lien, exemption of property from sale on execution, etc., etc., have a very different force and effect.

In reference to such a judgment, when obtained in the court of one State and suit is brought on it in the court of another State, the question sometimes arises as to how far the court of the latter State will go in investigating the circumstances surrounding the

[1] 9 Wall. 108.

judgment and the record in the case to determine the rights of the parties to the action at bar, when the judgment, which is the cause of the action, is ambiguous and doubtful in its terms. If there is ambiguity in the judgment to such an extent that the court cannot determine from the face of the judgment what its real meaning is, and against what party or parties, or for what amount judgment should be rendered, will the court for that reason find for the defendant, and refuse to enforce the judgment of the other State because of its ambiguity; or will the court inspect the entire record in the case for the purpose of ascertaining what is the true meaning of the judgment, and render its decision accordingly? It would appear that the latter is the rule, and that the court, while it cannot inquire as to the facts on which the judgment is based, the judgment of the court of the other State being conclusive as to the merits of the controversy, the court may and should, when a doubtful judgment is before it for interpretation, inspect the pleadings, proceedings and the entire record of the case for the purpose of determining what was the intention of the court rendering the judgment, and against what person or persons it was intended to be rendered.[2] For instance, if suit was brought in Ohio to enforce a judgment rendered in Indiana, the action in both States being against several defendants, and if the judgment rendered in Indiana mentions all the defendants in the caption, but in the body of the judgment mentions only one defendant by name, but gives judgment against the defendants (using the plural of the word), here would be an ambiguous judgment, and the Ohio court, for the purpose of determining against whom it was the intention of the Indiana court to render the judgment, should inspect the pleadings, and in fact the entire record, for the purpose of ascertaining what is the true meaning and effect of the judgment. The mention of the name of only one defendant in the body of the judgment will not, if several defendants are mentioned in the caption, make the judgment of force only against the one defendant mentioned in the judgment; and on the other hand, the use of the word defendants (in the plural number) will not, because of that fact, make the judgment of force against all the defendants. The court should inspect the entire record, and if from such inspection the true meaning of the judgment can with certainty be ascertained, judgment should be rendered accordingly. But if after such inspection of the entire record the judgment remains ambiguous and uncertain, then judgment should be rendered for the defendant, as no court should render a definite and certain judgment based upon an indefinite and uncertain one.[3] This would certainly appear to be the correct rule; for the courts of one State, in order to do everything in their power to carry out the constitutional provision and "give full faith and credit to the public acts, records and judicial proceedings" of every other State, should search those records and judicial proceedings so as to, if possible, give to them "full faith and credit." But if after searching the record the judgment still remains ambiguous and uncertain, then, as the court has no power to require the pleadings or the records of the case in the other State to be made more definite and certain, it is impossible for the court to ascertain the true meaning of the court of the other State rendering the judgment, and not knowing the true meaning of the "record and judicial proceedings," cannot give to it the "faith and credit" necessary to render a judgment, and can therefore do nothing in the premises but render its decision for the defendant or defendants in the action before it.

SAM'L J. BEALS.

St. Paul, Minn.

[2] Clay v. Hildebrand, 34 Kan. 694; Fowler v. Doyle, 16 Iowa, 534; Foote v. Glover, 4 Blatchford, 313; Bell v. Mossey, 14 La. Ann. 831; Hughes v. Blake, 1 Mason, 504.

[3] Barnes v. Michigan Air Line Ry. Co., 20 N. W. Rep. 36; Taylor v. Taylor, 64 Ind. 356; Boyd v. Baynbour, 5 Humph. (Tenn.) 386; Hubbard y. Dubois, 37 Vt. 94; Finnagan v. Manchester, 12 Iowa, 522; Lamar v. Williams, 39 Miss. 345; Pickett v. Pope, 3 Ala. 552; Dawson v. Bridges, 19 Ill. App. 280.

POWER OF CITIES IN MISSOURI TO LEVY TAXES, ETC.

Probably the most important question that now concerns the various cities in the State of Missouri, which have contracted or are contemplating contracting indebtedness by a two-thirds vote of the people, for the construction of public improvements, such as to provide water, light, etc., arises upon the construction of sections 11 and 12, art. 10, of the constitution of 1875, as recently interpreted by the Supreme Court of the State,

in the case of State v. City of Columbia,[1] In view of the great importance of the question to the cities interested, I wish to submit, for the consideration of your readers, a brief discussion of the subject involved, hoping that I may thereby aid in procuring a proper construction and application of the constitution when it shall be again before the courts. In the case referred to, the court sustained a proceeding by injunction restraining the issuing of bonds, because the ordinance provided for the levy of an annual tax in excess of 50 cents on the $100 of valuation, sufficient to pay the interest, and to constitute a sinking fund for the payment of the principal within twenty years. With all due respect to the court, I must say that I do not believe that it has given a proper construction to these provisions of the constitution, but it has ignored a material part of the 12th section, which is a grant of power to levy taxes, and should be liberally construed to accomplish the end in view, and it has extended the prohibitory mandate of the 11th section beyond the plain intention of the instrument, when these sections are construed together. The full scope and purpose of both sections must have been understood at the time of their adoption, and it must have been the intention to give effect to all the provisions of each without nullifying any part of either. "One constitutional limitation is just as binding as the other," says the court, and a grant of power is just as sacred and important as a prohibition of power, and should be as cheerfully sustained. This language of the court implies that there is a conflict in the provisions of the constitution, and some of them must prevail over the others. If this be so, which shall be upheld? How shall the court determine between them? We do not think, however, there is any serious trouble in construing these provisions so that each and every one of them may have its intended force when properly applied. The two sections, when read as a whole, and as it was intended that they should be read, will read as follows:

Section 11. Taxes for city and town purposes * * * in cities and towns having less than ten thousand and more than one thousand inhabitants, said rate shall not exceed fifty cents on the one hundred dollars valuation. For the purpose of erecting public buildings in cities the rates of taxation herein limited may be increased when the rate and the purpose for which it is intended shall have been submitted to a vote of the people, and two-thirds of the qualified voters voting at such election shall vote therefor. Said restrictions as to rates shall apply to taxes of every kind and description, whether special or general, except taxes to pay valid indebtedness now existing; provided, however (sec. 12), that no city or town shall be allowed to become indebted in any year in excess of the income provided for such year (*i e.*, in excess of the revenue realized from the levy of a tax at the rate of fifty cents on the one hundred dollars) without the assent of two-thirds of the voters thereof, nor with such assent shall any indebtedness be incurred to an amount including existing indebtedness in the aggregate exceeding five per centum on the value of the taxable property therein; and provided further, that any city incurring any indebtedness requiring the assent of the voters as aforesaid shall, before or at the time of doing so, provide for the collection of an annual tax sufficient to pay the interest on said indebtedness as it falls due, and also to constitute a sinking fund for payment of the principal thereof within twenty years.

The exception in section 11 from the general rate of taxation in favor of public buildings when authorized by a two-ihirds vote does not authorize a city to become indebted with a view to payment in future years, but simply allows an increase of the rate to be levied for that purpose, and there is no restriction as to amount or rate, but for other purposes the annual rate is limited. The tax that may be levied under section 11, although ample for current expenditures, would not meet all the contingencies that might arise in which it would be necessary to increase the rate for the public good. Moreover, section 11 does not prohibit a city from contracting indebtedness in any year that might require an indefinite period of time to liquidate with the surplus realized from the annual rate after paying current demands. It was necessary, therefore, to enact section 12 to prevent cities, etc.. from contracting indebtedness in excess of the revenue to be derived from the rate of taxation prescribed by section 11 without the consent of the voters, and yet give the city an opportunity to incur indebtedness to the extent specified by a two-thirds vote of the legal voters when desirable to do so. The same section (12) which authorizes and empowers the city to contract indebtedness in excess of the annual income and revenue empowers the city, indeed, requires the city to provide an annual tax sufficient to liquidate it within twenty years. The question is, shall this provision of the constitution stand for what it says, or shall this plain grant of power, which is an exception to other restrictions upon the city, be abrogated by judicial construction of some other provision of the same instrument? As a rule, the matter of exceptions or provisos are modifications of the principal subject, and sometimes antagonistic to it, in which case the subject-matter of the exception is withdrawn from the restrictions imposed by the general law or instrument.[2]

It does not require the expansion of any rule of construction to uphold all the provisions of both sections when applied to the subjects or circumstances to which they respectively relate. But the court says: "This section (12) does not un-

[1] 35 Cent. L. J. 225. See also article on Municipal Power of Taxation, by Alex. Martin, Esq., 35 Cent. L.J. 227.

[2] St. Joseph Board, etc. v. Patton, 62 Mo. 449; State, etc. v. Railroad, 74 Mo. 163.

dertake to give a county, city or town the power to levy a tax in excess of the maximum rates so far as they are specified in sec. 11. When a county, city or town has levied the highest rate allowed by section 11, it can levy no further or additional tax." In our opinion the 12th section does undertake to give power to levy a tax in excess of the rate prescribed by section 11, and notwithstanding that rate may have been levied, the city may still make an additional and further levy for the purposes expressed in section 12. If this were not so, section 12 would be a dead letter. It would seem that the court has wholly overlooked that part of section 12 which requires the city before or at the time of incurring an indebtedness in excess of the annual income, to provide for the collection of an annual tax sufficient to pay the interest as it falls due, and also to constitute a sinking fund for payment of the principal within twenty years, else it could not have reached any such conclusion. If section 11 conferred the only direct authority to levy taxes it might be said that when the highest rate allowed by it has been levied no further or additional tax can be levied. But when section 12, which grants power to contract indebtedness, expressly requires provision to be made for the collection of an annual tax for the purpose of paying the interest and the principal in the future, this must be construed as undertaking to give the power to levy a tax in excess of the maximum rates specified in section 11, otherwise it was unnecessary to enact it. The tax here authorized has nothing to do with the taxes authorized by section 11. This tax is for a specific purpose, clearly expressed, and which was not contemplated or provided for in section 11, and the power to levy it regardless of the rates levied under section 11, cannot be denied without expunging a plain provision from the constitution by judicial construction. This should not be done, for "a constitutional grant of power is just as binding as a prohibitory restriction." If there be an apparent conflict between the different provisions of the same instrument, they must be so construed, if possible, as to give effect to all and every part, according to the intent, as discovered or ascertained from the four corners thereof. The plain and undoubted intent of section 12 is to allow indebtedness to be contracted by a two-thirds vote of the qualified voters of a city, and it is equally plain that an annual tax must be provided at the same time sufficient to pay the interest and principal, and it is clear that this tax was not intended to be any part of the annual rate prescribed by section 11, which was intended to meet the current expenditures, for the city cannot become indebted beyond the amount of such income in any year without the assent of the voters. But when with the assent of the voters an indebtedness is created in excess of such annual income and revenue, an increase in the levy, or a special levy to meet it is a necessity and must have been so considered when the constitution was drafted, and to that end the power to make such increased or additional levy is clearly expressed, and it cannot be construed out of or removed from the constitution, though it may be, as it has been by the court in the Columbia case, wholly ignored and unnoticed. We believe, however, that upon a careful reconsideration of the question the court will be able to see all parts of the constitution alike, and will give to each provision thereof its proper force.

H. S. KELLEY.

St. Joseph, Mo.

CHATTEL MORTGAGE — LIVE STOCK — LIEN — AGISTMENT.

WRIGHT V. SHERMAN.

Supreme Court of South Dakota, Sept. 7, 1892.

The lien of a chattel mortgage properly filed is paramount to that of an agister for subsequently pasturing the mortgaged stock, unless it is shown that the mortgagee consented, either expressly or impliedly, that such stock might be so pastured and subjected to such lien, and the fact that the mortgagor retains possession of the mortgaged property is not of itself proof of such consent.

KELLAM, P. J.: The controlling question in this case is whether the lien of an agister for the feeding and pasturing of stock, received from the mortgagor in possession, takes precedence over the lien of a chattel mortgage upon the same stock, given and filed in the register's office, as provided by law, prior to such feeding and pasturing. Respondent makes the preliminary objection that the complaint does not state a cause of action, nor show the plaintiff entitled to any relief, or to resist defendant's claim for a lien, for the reason that plaintiff's interest, if he have any, in the property involved, depends entirely upon the terms of a chattel mortgage, which are not pleaded, or set out in the complaint, except as an exhibit thereto, and so not entitled to be considered. Under the rule approved and adopted by a majority of this court in Aultman v. Siglinger, 50 N. W. Rep. 911, this would probably have been good ground for demurrer to the complaint. Defendant, however, did not demur, but answered upon the merits and went to trial, when the chattel mortgage was offered in evidence and received without objection. Under these circumstances, the defendant cannot in this court for the first time take advantage of this defect in the complaint, which was plainly amendable, and which was in fact fully covered by evidence received without objection. Johnson v. Burnside (S. D.), 52 N. W. Rep. 1057. Comp. Laws, § 5486, under which defendant's lien is claimed, is as follows: "Any farmer, ranchman, or herder of cattle, tavern keeper, or livery stable keeper, to whom any horses, mules, cattle, or sheep shall be intrusted for the purpose of feeding, herding, pasturing, or ranching, shall have a lien upon said horses, mules, cattle or

sheep for the amount that may be due for such feeding, herding, pasturing, or ranching, and shall be authorized to retain possession of such horses, mules, cattle, or sheep until the said amount is paid: provided, that these provisions shall not be construed to apply to stolen stock." The undisputed facts upon which this controversy must be determined are that upon the 1st day of May, 1888, the owners of the stock involved made and delivered to plaintiff's assignor a chattel mortgage on the same, which was duly filed in the office of the register of deeds of the proper county, June 30, 1888; and that on the 12th day of May, 1889, the mortgagors, still in possession, left the stock with defendant to be fed and taken care of; that, without any knowledge on the part of plaintiff or his assignor, defendant kept and fed said stock, and had not been paid therefor when this action was commenced by plaintiff to get possession of the same under his said mortgage. Thus is squarely presented the question of priority between the two liens. When defendant took this stock to pasture, he took it knowing (for the filing of the mortgage notified him) that plaintiff had a mortgage upon it to secure an indebtedness not yet due. Comp. Laws, § 4380. He knew that such mortgage constituted an existing lien upon such stock at the time he took it to pasture. Section 4357. He knew that plaintiff had a right, whenever he might choose to do so, to take possession of the stock for the mortgage of which he had notice so provided. He knew, for the said section 4358 so declares, that "no person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." He knew that to just the extent that another charge was put upon the property prior to plaintiff's mortgage his security would be impaired. He knew that, under the law and the terms of the mortgage, the mortgagors were entitled to the possession of the stock, and that in reason, and according to custom, the mortgagors so in possession would be expected to care for and feed them. For the purpose of determining his right in this matter, he knew all these facts as well as though he had been personally and actually informed of them at the very time he took the stock. He was under no obligation to take them. We do not, therefore, discover any equitable grounds upon which his lien ought to be preferred to that of the mortgagee. The plaintiff had done everything required of him to establish his lien upon the property and to give notice thereof to defendant long before defendant's claim accrued and it would be manifestly unfair, under said circumstances, to postpone his claim to that of defendant. The common law lien of the innkeeper on the baggage of his guest is justified on the ground that he is under obligation to receive and provide for such guest, but the innkeeper has no lien upon baggage brought by his guest if he knows that such baggage does not belong to the guest—that he has no right to subject it to such lien. Johnson v. Hill, 3 Starkie, 172; Broadwood v. Granara, 10 Exch. 417; Grinnell v. Cook, 3 Hill (N. Y.), 485. And so the artificer's lien rests upon the fact that his skill and labor have imparted an additional value to the chattel upon which the lien is claimed. But the case of an agistment does not fall within that principle, and so the agister has no lien at common law, and this is the very reason given for the absence at common law of an agister's lien. Jackson v. Commins, 5 Mees. & Wels. 342; Wallace v. Woodgate, 1 Car. & P. 575. But in every case where the workman's lien has been held superior to the interest of another prior in point of time, it has been placed upon the ground that the circumstances justified the inference that the one in possession had an implied agency to subject the property to such lien. We think it could be sustained upon no other ground. Hiscox v. Greenwood, 4 Esp. 174; Hammond v. Danielson, 126 Mass. 294; White v. Smith, 44 N. J. Law, 105; Hollingsworth v. Dow, 19 Pick. 228; Clark v. Hale, 34 Conn. 398; Kirtley v. Morris, 43 Mo. App. 144; Meyer v. Berlandi, 39 Minn. 438. And so a shipwright may have a lien against a prior mortgage for repairs upon a vessel, but this is both upon the ground that such repairs enhance the value of the ship, and the further, and it seems to us the better, ground, that it was presumably the intention of all parties that the vessel should be kept in a proper state of repairs to continue its earning capacity, and so the party in immediate possession may fairly be presumed to have authority to order such repairs. Williams v. Allsup, 10 C. B. (N. S.) 417; Scott v. Delahunt, 5 Lans. 372. It appears from the record that the mortgagors were themselves farmers and stock raisers. In the absence of any suggestion to the contrary the inference is a fair one that the mortgage was given and taken with the understanding that the mortgagors should keep and look after the mortgaged stock according to the well-known custom in such cases, at their own expense, and not at the expense of the stock or the mortgagee. Right here we quote from the opinion of the court in Howes v. Newcomb (Mass.), 15 N. E. Rep. 125, where the same question was presented as in this case: "It should be kept in mind that the purpose of a mortgage is to furnish security, and that the property is usually left with the mortgagor for his convenience, with an understanding that nothing shall be done or permitted by him to impair the security. An agreement which will defeat the purpose of the transaction should not be inferred or implied against a mortgage without cogent evidence. A mortgage of horses given to secure the performance of an act in the distant future is worthless if the mortgagor may create a lien upon them by putting them out to be boarded." The statute under which the above case was decided provided that "persons having proper charges due them for pasturing, boarding or keeping horses or other domestic animals brought to their premises, or placed in their care by or

with the consent of the owners thereof, shall have a lien," etc. It was held that the mortgage lien was superior. Many of the States have statutes giving liens to agisters, but they are so dissimilar in terms that few of the cases can safely be used as authorities, except as to the principles involved. Sargent v. Usher, 55 N. H. 287, came up under the following statute: "Any person to whom any horses, cattle, sheep or other domestic animals shall be intrusted to be pastured or boarded shall have a lien thereon for all proper charges due for such pasturing or board, until the same shall be paid or tendered." It was held that an agister to whom was intrusted for keeping, by the mortgagor, mortgaged horses, acquired no lien on them superior to that of a prior recorded mortgage, but that the lien of the mortgage would prevail. In Indiana, under a statute providing that "the keepers of livery stables, and all others engaged in feeding horses, cattle and hogs and other live stock, shall have a lien upon such property for the feed and care bestowed by them upon the same," etc., such lien is held inferior to that of a chattel mortgage previously made and recorded. Hanch v. Ripley, 127 Ind. 151. And so in Michigan, under a statute giving a mechanic a lien for the value of his labor and skill, and authorizing him to retain possession of any article to which such labor and skill had been applied until such charges were paid, it was held that such lien was subordinate to that of a prior chattel mortgage, and that such mechanic's lien would attach only to the mortgagor's equity of redemption. Denison v. Shuler, 47 Mich. 598. The same law also gives a livery stable keeper a lien for the keeping and care of animals intrusted to him, and authorizes him "to retain possession of the same until such charges are paid;" but in Reynolds v. Case (Mich.), 26 N. W. Rep. 838, where the livery stable keeper refused to surrender possession of a horse to a prior mortgagee until his charges for keeping the horse were paid, the court said: "The lien for the keeping of the horse could not prevail over a valid prior chattel mortgage, and plaintiffs were not obliged to tender the amount of such claim for keeping the horse before they were entitled to his possession." The Vermont statute is nearly identical with that of Massachusetts, *supra*, and in Ingalls v. Vance, 18 Atl. Rep. 452, it was held that the agister's lien for keeping stock brought to him by the mortgagor did not displace or supersede that of the prior mortgagee; but it was afterwards held by the same court in Ingalls v. Green, 20 Atl. Rep. 196, that after the sale of the mortgaged property under the mortgage, the officer so selling should pay such agister's claim out of the surplus funds, if sufficient, which was equivalent to saying that the agister had a lien upon the mortgagor's interest in the stock, which seems to us just what he should have. The Nebraska statute is: "When any person shall procure contract with or hire any person to feed and take care of any kind of live stock, it shall be unlawful for him to gain possession of the same by writ of replevin or other legal process, until he has paid or tendered the contract price or a reasonable compensation for taking care of the same;" and it was held that the lien of a previously executed and recorded chattel mortgage was superior to that of an agister for keeping and feeding the mortgaged stock at the instance of the mortgagor. Bank v. Lowe, 22 Neb. 68. In McGhee v. Edwards (Tenn.), 11 S. W. Rep. 316, under a statute giving a livery stable keeper a lien for the keeping of horses "the same as the innkeeper's lien at common law," it was held that the lien of a recorded chattel mortgage takes precedence over that of a livery stable keeper for feeding a mortgaged horse subsequent to the giving and recording of the mortgage. The doctrine of these cases seems to be that the chattel mortgage is a means and form of security authorized by law; that when the mortgagee has done every thing required of him by the law to perfect and establish his security, and give notice thereof to the world, it ought not to be compromised or defeated by putting before it, as a superior lien, the claim of another afterward incurred, and without his knowledge or consent; and that, in the absence of any clearly expressed intention by the legislature that such later charge should constitute a paramount lien, the courts ought not to make it so. When the statute gives a "lien" it does not necessarily mean a first lien—a lien displacing all existing liens. Miller v. Anderson (S. D.), 47 N. W. Rep. 957; Hanch v. Ripley, *supra;* Easter v. Goyne (Ark.), 11 S. W. Rep. 212. Against the foregoing we find only the two opposing cases of Smith v. Stevens, 36 Minn. 303, and Case v. Allen, 21 Kans. 217. In the former case the court suggests, in answer to the apparent hardship of making the earlier lien subordinate to the later, that the mortgagee knew when he took his mortgage that the mortgagor could and might subject it to another lien which would be paramount to and destroy it *pro tanto;* but to us it seems fairly to meet the situation of the parties to say that when the agister took the stock to pasture he knew that plaintiff then had an existing lien upon it. Filing his mortgage was just as efficient as actual notice would have been. The inquiry of the Indiana court in Hanch v. Ripley, *supra*, seems quite pertinent: "Had the appellant had actual notice of the appellee's mortgage, and in the face of such notice had he taken the property to keep, what plausibility would there be in his claim to superiority of lien? What equity would there be in such a claim? None whatever." In the later case of Meyer v. Berlandi, 39 Minn. 438, the Minnesota court, in referring to Smith v. Stevens, *supra*, says: The opinion rests "upon the doctrine of agency — authority implied from the circumstances—from the mortgagee to the mortgagor to create a lien for such a purpose." So that to adopt the broad rule that the lien of the agister upon stock intrusted to his care

by the mortgagor in possession is superior to that of the prior recorded mortgage, the court must first hold, as matter of law, that the circumstance that the mortgagor is left in possession is sufficient in every case to support the conclusion of agency. What would be the effect then if the mortgagee expressly notified the agister that he refused to consent to the mortgagor's placing the stock in his hands to be subjected to the cost of their keeping, for the reason that the mortgagor had in his mortgage agreed to keep them at his own expense, and that he was entirely able to do so? Would the court still feel authorized to assume "an agency implied from the circumstances," and infer consent of the mortgagee when it was expressly proved that he did not consent? Fully agreeing with the Minnesota court that the agister's lien, as against the prior mortgagee, must depend upon his consent, we think upon principle the true rule is that his lien, first established as required by law, can only be displaced when his consent or authority, express or implied, is affirmatively shown, and that a fact, like the retention of possession, which would not be received as competent evidence even tending to show authority to charge or affect the mortgagee's interest in the property in any other way, cannot reasonably be taken as conclusive evidence of his consent that the property be subjected to the agister's lien. Such consent may of course be shown by circumstances; but to show it requires something more than the simple fact of leaving the property in the mortgagor's possession, for that is the general and almost universal custom, while for the mortgagor in possession to place such property out to be boarded or taken care of is unusual and exceptional; and, when the mortgagee simply does what is usually done in such cases, he ought not to be taken as thereby consenting in advance that the mortgagor may do what is usually not done in such cases. In the other opposing case (Case v. Allen, *supra*), in the course of his opinion, Judge Brewer makes the inquiry: "Can he who has promised that the property shall, to the extent of its value, be security to the mortgagee for a certain debt, subsequently cast upon it a lien which shall take precedence of his prior contract, and to that extent diminish the value of the mortgagee's security?" He concludes that he can, and so gives the agister's lien precedence.

It seems to us that in this State such conclusion would be against Comp. Laws, § 4388, which provides that "no person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." We have hesitated a little over the following words in said section 5486, which gives the lien: "And shall be authorized to retain possession of such horses, * * * until the said amount is paid;" but we conclude that this section was not intended to touch the matter of priority of different liens, for that was beyond the power of the legislature to disturb (Meyer v. Berlandi, *supra*), but simply to give a lien, as between the parties to the contract of agistment and their privies. The succeeding section (5487) throws light on the intention and meaning of said section 5486. It recognizes the impropriety of attempting to authorize or allow one person to subject the property of another to a lien, by providing that such lien shall not ensue unless the party so intrusting such stock to the agister is the owner thereof; that is, the power to incumber depends upon and is measured by ownership. The mortgagors could subject this stock to defendant's lien as agister to the extent that they owned the same. While in this jurisdiction the mortgagor of personal property retains the title, and is in a general sense the owner of the mortgaged property, still, in respect to his right or power to subject it to liens, he is really owner to the extent of his interest only. The right of possession is an incident to the right to a lien, and the agister may retain possession against everybody as to whom he has a superior lien. His lien is not superior to that of the prior mortgagee, and so he may not retain possession as against him. It is observable that the statute under which the Michigan cases, *supra*, were decided in favor of the priority of the mortgage lien, and the right to possession under it, has the same provision authorizing a retention of the property by the livery stable keeper or agister. The principle of those cases which hold that the chattel mortgage remains the precedent lien seems right to us; while to hold that the mortgagee, who has exactly and in good faith met every requirement of the statute, which undertakes to secure and establish his lien upon an interest in the property covered by his mortgage, may be supplanted and undermined without any fault or negligence upon his part, seems an encroachment upon the fundamental rights of property. Our conclusion is that where there is nothing in the evidence to show that the mortgagee consented, either expressly or impliedly, that the mortgaged property should be taken care of by another, and the expense charged against the property, the lien of the chattel mortgage continues superior and paramount to that of the agister, and that the fact that the mortgagor retains possession is not necessarily sufficient evidence of such consent. The trial court having definitely charged the jury otherwise, the judgment is reversed, and the cause remanded for a new trial; all the judges concurring.

NOTE.—The principal case is in accord with the weight of authority. The exhaustive character of the opinion of the court leaves little to be added. Mr. Jones, in his work on Liens, with the adjudged cases on both sides of the question before him, says (§ 691): "A chattel mortgage upon a horse is superior to a subsequent lien of a stable keeper, where the horse is placed in the stable by the mortgagor after the making of the mortgage, without the knowledge or consent of the mortgagee." Citing therefor, Jackson v. Kasseall, 30 Hun, 231; Bissell v. Pearce, 28 N. Y. 252; Charles v. Neigelsen, 15 Ill. App. 17; Sargent v.

Usher, 55 N. H. 287; Bank v. Lowe (Neb.), 33 N. W. Rep. 482. The learned author adds: "It is not to be supposed that a statute giving a lien for the keeping of animals was intended to violate fundamental rights of property by enabling the possessor to create a lien without the consent of a mortgagee, when the person in possession could confer no rights as against the mortgagee by a sale of the animals. The keeper of animals intrusted to him by the mortgagor undoubtedly acquires a lien as against the mortgagor, but it is a lien only upon such interest in them as the mortgagor had at the time, and not a lien as against the mortgagee between whom and the keeper of the animals there is no privity of contract. The mortgagor, though in possession, is in no sense the mortgagee's agent, nor does he sustain to the mortgagee any relations which authorize him to contract any liability on his behalf. The statute cannot be construed to authorize the mortgagor to subject the mortgagee's interest to a lien without his knowledge or consent, as security for a liability of the mortgagor, unless such a construction clearly appears from the language of the statute to be unavoidable."

In McGhee v. Edwards (Tenn.), 11 S. W. Rep. 316, it was held that a recorded chattel mortgage on a horse is superior to a subsequent lien of a livery stable keeper acquired under the statute, where the horse is placed in the stable after the making of the mortgage, without the knowledge of the mortgagee, though the stable keeper had no notice in fact of the mortgage. Attention is called in that case, as in the principal case, to the fact that authorities are to be found holding a contrary view. See Case v. Allen, 21 Kan. 217; Smith v. Stevens, 36 Minn. 303, 31 N. W. Rep. 55, which were cases where an agister's lien was held superior to an older registered mortgage. The court, however, in the Tennessee case, thought that "their reasoning does not commend them to us sufficiently to shake our convictions that the other view is the sounder and better."

A lien for the keeping of a horse is subject to that of a valid prior chattel mortgage. Reynolds v. Case, 60 Mich. 76. The fact that mortgagees of cattle allowed them to remain in care of defendant, after learning that they had been placed in his care by the mortgagor, does not render their lien subordinate to that of defendant for feeding the cattle as created by Acts Vermont, 1884, No. 91. To maintain a lien thereunder, defendant must show that the cattle were placed in his care by the consent of the owner. Ingalls v. Vance (Vt.), 18 Atl. Rep. 452.

Laws N. Y. 1872, ch. 498, § 1, as amended by Laws 1880, ch. 145, provide that any person keeping any animals at livery or pasture, or boarding the same for hire, under any agreement with the owner thereof, may detain such animals until all charges for their keeping shall have been paid. It was held that a mortgagor of certain horses, who, after having defaulted in the performance of the conditions of the mortgage, but being still in the possession of the horses, entered into an agreement with the plaintiff for their keeping, was an owner of the horses within the meaning of the statute, and that such statute having been in force when the mortgage in question was executed to defendant, and the required notice of the lien arising under such statute and agreement having been given to the mortgagee, such lien took precedence over the mortgage. Corning v. Ashley, 51 Hun, 483. An agister who, by Laws Vermont, 1884, No. 91, is given a lien for his charges if they come due while the stock is in his possession, is not entitled to a lien as against the mortgagee of stock put in his charge by the mortgagor, but his lien does attach to the surplus proceeds of the mortgage sale, as the taking of the stock out of his possession by the mortgagee is not a voluntary surrender of the property. Ingalls v. Green (Vt.), 21 Atl. Rep. 196.

Where one converts to his own use stock on which he claims a mortgage, but to the possession of which a prior mortgagee is entitled under his mortgage, such person is not entitled to a lien for care and pasturage as against the prior mortgagee. Howard v. Burns (Kan.), 24 Pac. Rep. 981. The lien of an agister of mortgaged horses is prior to the claim of the assignee of the past due notes secured by the mortgage. Blain v. Manning, 36 Ill. App. 214. Under Rev. Stat. Ind. § 5292, providing that the keepers of livery stables and all others engaged in feeding horses and other live-stock, shall have a lien for the feed and care bestowed on them, the lien of an agister is inferior to that of a prior mortgage duly recorded. Hanch v. Ripley (Ind.), 26 N. E. Rep. 70. As against a mortgagor and his creditors, an agister has no lien on cattle fed under a contract with one who has wrongfully taken possession under a void mortgage. Gate v. Parrott (Neb.), 46 N. W. Rep. 387.

CORRESPONDENCE.

CAPITAL PUNISHMENT.

To the Editor of the Central Law Journal:

There is one question of vital importance I should like to see brought before the American Bar Association. It is this: The association, in my opinion, should urge the passage of a law by the United States, and each State in the Union, prohibiting the hanging or otherwise taking human life by legal process, upon the strength of circumstantial evidence. Indeed, I am opposed to the taking of human life by either legal or other process, as we have no right to take what we cannot restore. But when we take into consideration the great number of innocent persons whose lives have been taken in the name of law, upon the evidence of circumstances, how appalling it is! It is a cruel relic of the past, which is too hideous and depraved to live in the light of the present. Kill it by all means; it has lived already too long.

J. P. L. Weems.

LAW OF FLORIDA AS TO WILLS MADE IN OTHER STATES.

To the Editor of the Central Law Journal:

I desire to call your attention to an error which appears in the Journal of the issue of October 14th. In your comments on the subject of uniformity in State legislation, appears the statement that in Florida (among other States mentioned) the rule prevails that a will made out of a State, which is valid according to the laws of the State or country where made, is given the same effect as if executed according to the laws of the State. This rule certainly does not prevail in Florida. The point was settled by our supreme court in Crarey v. Clark and Alsop, 20 Fla. 849. In that case the court say: "A will, to affect real property in this State, made out of the State, must conform to the laws of this State as to form and manner of its execution." In that case the court construed the law as it was prior to the date at which our Revised Statutes went into effect. The Revised Statutes went into effect in June last. I can find therein nothing to sustain the proposition that a will made out of this State,

if valid according to the laws of the State where made, is valid here. The provision as to the probate of foreign wills is section 1811, which reads as follows: "Probate of wills (conforming to the laws of this State in the form and manner of execution), duly obtained and granted by any court in any of the States, territories or districts of the United States, or in any foreign country, which relate to property in this State, shall be admitted to record in the county judge's court, and shall, when so recorded, have the same force and effect as to the disposition of the property thereby devised or bequeathed as the probate of wills executed in this State." H. B. PHILIPS.

BOOK REVIEWS.

AN INTRODUCTION TO THE STUDY OF THE CONSTITUTION.

The author states that this book was written "for the purpose of bringing before the student and reader of our American constitutional system, a mass of information which at present lies scattered among the products of many different writers, inquirers and thinkers." Its scope embraces the presentation of what may tend to produce a better understanding of all that is implied in the existence of the government of the United States. It aims to trace the play of physical and social factors in the production of law in general, including constitutional law. It will thus be seen that the work partakes not only of a legal but of a philosophic character. The student of laws, and of constitutional laws in particular, will find much of value here. The work is one of the volumes of the studies in history and politics issued by the Johns Hopkins Press.

FOSTER'S FEDERAL PRACTICE.

We made favorable mention of this work at the time of its first appearance in 1890. The passage of the Evarts Act, creating the circuit courts of appeal which radically changed the jurisdiction and practice affecting appeals and writs of error, and the many recent decisions explaining the right to and practice in removals from the State to the federal courts, have rendered this second edition necessary. The preface states that many of the original sections have been rewritten and new sections have been added to the original chapters, including all material statutes and decisions already reported before the October term of 1891, and many decisions since that date which have been added while the book was in the press. New chapters have been added on practice in admiralty, practice in the court of private claims, and practice in the court of claims. The chapters on jurisdiction, evidence, costs, practice at common law, removal of causes and writs of error and appeals, have been entirely rewritten and nearly doubled in size. We have no doubt that the book will now serve as a full guide to the practitioner in every branch of federal practice in civil causes. The first edition met with a very favorable reception at the hands of practitioners. The enhanced value of the second edition may be understood by the statement that the work now embraces two large volumes, each as large as the first edition. We commend the book in the strongest terms. Care, accuracy and exhaustiveness are apparent throughout, and the mechanical execution of the work leaves nothing to be said by way of criticism. It is published by the Boston Book Company, Boston.

JONES ON THE NEGLIGENCE OF MUNICIPAL CORPORATIONS.

The tendency of text-books seems to be, and naturally is, in the direction of special and less extended topics. The growth and extension of the law, commensurate with that of the country, renders difficult the preparation of treatises upon the broad common law subjects. This, in addition to the fact that the field is quite well covered by standard books. Hence, the book writer of to-day is rapidly becoming a specialist, and his works are on subjects within subjects. This is illustrated by the appearance of such works as Ray on Negligence of Imposed Duties, Bishop on Non-contract Law, Harris on the Law of Damages by Corporations, and the book we now have before us, Jones on Negligence of Municipal Corporations. It will be observed that it covers but a small part of the law of municipal corporations, but that an exceedingly important branch. It treats in successive chapters of early instances of municipal liability for negligence, of the dual character of municipal corporations, of the liability for failing in solely municipal duties, of liability in the matter of neglect and repair of highways, duties respecting streets, roads and sidewalks, snow and ice on street and sidewalk, liability for negligent construction and neglect of bridges, negligence in making public improvements, *respondeat superior*, negligence respecting *ultra vires* acts, notice, proximate cause, contributory negligence, evidence and damages.

We have given the book quite an extended examination, and find it well written, accurate and exhaustive. The style of the author is pleasing, and the foot-notes indicate labor and diligence. There is a first-class index. The work has nearly six hundred pages, and is splendidly printed and bound. Published by Baker, Voorhis & Co., New York.

BOOKS RECEIVED.

The American Probate Reports: Containing Recent Cases of General Value Decided in the Courts of the Several States on Points of Probate Law, with Notes and references. By Charles Fisk Beach Jr., of the New York Bar, Author of "A Manual of the Law of Wills." Vol. VII. New York: Baker, Voorhis & Co., Law Publishers, 66 Nassau Street. 1892.

A Treatise of the Law of Evidence. By Simon Greenleaf, LL.D. In Three Volumes. Fifteenth Edition. Revised, with Large Additions. By Simon Greenleaf Croswell. Boston: Little, Brown & Company. 1892.

Principles of the Law of Wills, with Selected cases. By Stewart Chaplin, Professor of Law in the Metropolis Law School, New York, and Author of "Chaplin on Suspension of the Power of Alienation." New York: Baker, Voorhis & Company. 1892.

HUMORS OF THE LAW.

Sitting magistrate (to habitual toper, a frequen visitor in the dock): "So you're here again. Wha brought you this time?"

H. T. "Two policemen, your honor."

Magistrate: "Two policemen! Ah! drunk I suppose?"

H. T. "Yes, your honor, both of 'em."

Prisoner discharged.

In the United States court at Bismarck, Dakota, Judge Francis presiding, a white man was being tried for stealing ponies from Indians off the Fort Berthold Reservation. Some three or four Indians who could not speak English were called as witnesses in the case, while another Indian who went by the name of Pawnee Tom, who could speak some English, was sworn as an interpreter. After the Indians were sworn the judge turned to Pawnee Tom and asked him what he told the Indians was the penalty in case they swore falsely. Tom, with much vehemence, said that he told them if they didn't tell the truth God would take them up where he was, and never let them come down again.

Attorney for defendant (concluding his address to the jury)—"And now, gentleman, I leave this poor prosecuted innocent's cause in your hands, with this last prayer: when you get to your room, when you deliberate upon your verdict, do not, I beg of you, allow yourselves to be influenced by my client's present exterior, but imagine him washed and combed."

Philanthropic Visitor (at the jail)—"My friend, may I ask what brought you here?"

Bad Dick (from the slums)—"Yes, sir. Same thing that brings you here. Poking my nose into other folks' affairs. Only I gener'ly went in by way of the basement winder."

Judge—"What value do you put on the boots that were stolen from you?"

Witness—"You see, my lord, they cost me eight marks when new, then I had them soled twice, which came to three marks each time— total, fourteen marks."

"Well, if that ain't mean," exclaimed the prisoner. "Every darned one o' the stories in this here paper they've jimme to read is continued! An' me to be hung next week!"

Under the statutes of the State of Minnesota, a person who shall use, in reference to and in the presence of another, abusive and obscene language intended and naturally tending to provoke an assault or any breach of the peace, is guilty of a misdemeanor.

Under this statute a justice of the peace, in one of the interior counties of Minnesota, drew a complaint, upon which a warrant was issued and the defendant brought into court for trial. The complaint and warrant were substantially as follows:

"The complaint of J D of said county, before A J S, one of the justice of the peace in and for said county, being duly sworn on his oath, says: That on the first day of January, 1892, at the town of Blank, in said county, one R F did commit the crime of criminal conversation in the presence of said complainant, which naturally tended to provoke an assault or breach of the peace, and prays that said R F may be arrested and dealt with according to law."—*Green Bag.*

LEGAL PATRON SAINTS.

Very few of my legal brethren know that the lawyers have a patron saint, and fewer of them, I believe, care whether they have or not. The majority of their clients, however, feel differently about the matter, and from expressions I sometimes hear them make, they evidently wish that lawyers had several patron saints, and that they would invoke their aid more frequently than they do. When I was in Rome last summer a gentleman told me a story.

Once upon a time during the pontificate of Pope Gregory the Great, a number of the members of the Roman Bar Association called upon that illustrious pontiff and complained that they alone of all the arts, sciences, crafts and professions were without a patron saint. The pope condoled with them over the lamentable deficiency of a personage so indispensable to the requirements of this much-abused fraternity, and promised them instant relief. He looked over the calendar of saints and found that there was no one disengaged, but suggested that he might double the duties of some person who was not too hard worked. He name several, but the lawyers invariably demurred, and the pope felt compelled to sustain their complaints. Finding that he could not satisfy them in their way, he made the following order:

"And now, to-wit, May 27, 1080, it is ordered that the lawyers here present blindfold one of their number, and that the one so blindfolded be turned loose in St. Peter's (the old Basilica), among the statues of saints and others, and that the one whose statue he may clasp shall be the patron of the legal profession.

(Signed) "HILDEBRAND, P. M."

This order was considered by all as the perfection of judicial wisdom, and it was immediately carried out by the lawyers. They blindfolded one of their number, started him out, and he soon clasped a figure and cried out: "This shall be our patron saint." Imagine the disgust of his legal brethren when, as they hurried forward eager to learn the coveted patron's name, they found their deluded brother clasping in warm embrace the devil. It was Lucifer in the groups of the archangel Michael driving the rebel angels out of heaven. It is not recorded that a new trial was moved for within four days, or that an appeal was taken, so the devil remained our patron for nearly three hundred years, when St. Ives, a lawyer himself, was canonized and made our patron saint. His feast day occurs May 22. He was born in France in 1253, and after a studious life was appointed ecclesiastical judge of Rennes. "He protected the orphans and widows, defended the poor and administered justice to all with an impartial application and tenderness which gained him the good-will even of those who lost their causes. He was surnamed the advocate and lawyer of the poor." It is said that he is the only lawyer in heaven, and that even his admission to practice in "the land which is fairer than day" was owing to a blunder on the part of Saint Peter. St. Ives died, and with a degree of promptitude foreign to the profession, immediately presented himself at the gates of heaven. Finding that court had adjourned, he hammered at the golden gates and demanded admittance. St. Peter, hearing the noise, hurried to his post, looked at the visitor, asked his name, residence and former business occupation.

"I am Ives," he replied, "from Bretagne, and I am a lawyer; let me in."

St. Peter hesitated, and then ejaculated: "A lawyer, you say?" "Yes," he replied; "open the gates."

St. Peter retired for a few minutes, no doubt to consult his books, returned, and with some hesitancy admitted the new-comer. When inside, St. Ives, turning to St. Peter, said: "What is your name? What business do you follow?"

St. Peter told him his name was Peter, and that he was porter of heaven; carried the keys, and that he held his appointment from the Lord himself.

"Humph!" said Ives, "I don't know about that; I wonder if you are, I doubt it. I would like to see the record; where is your commission?"

St. Peter, taken aback by having his authority questioned, left abruptly, and hastening to his Master, said: "Dear Lord, I have just admitted within the

gates a fellow named Ives, who says he is a lawyer, and who, as soon as he gained entrance with the court, questioned my authority as porter of heaven, wanted to see the record, and asked for my commission. What shall I do?"

"Look here, Peter," said the Lord, "now that is the first lawyer who ever entered heaven, and let it be the last; for if these fellows get in here they will turn everything upside down and keep the whole place in an uproar."

A. D. WATERSON.

WEEKLY DIGEST

Of ALL the Current Opinions of ALL the State and Territorial Courts of Last Resort, and of the Supreme, Circuit and District Courts of the United States, except those that are Published in Full or Commented upon in our Notes of Recent Decisions.

1. APPEAL—Distribution of Estates.—An appeal from a judgment of heirship and final distribution cannot be considered unless taken within 60 days after the entry of such judgment, as required by Code Civil Proc. § 1664.—IN RE WESTERFIELD'S ESTATE, Cal., 30 Pac. Rep. 1104.

2. APPEAL — Jurisdictional Amount.—Rev. St. 1881, § 6339, provides that, "if any person or corporation shall temporarily convert any part of his personal property into property not taxable, for the fraudulent purpose of preventing such property from being listed, and of evading the payment of taxes thereon, he or it shall be liable to a penalty of not less than $50, nor more than $5,000, to be recovered in any proper form of action," etc.: Held that, as an action under the section is for the recovery of money only, an appeal from a judgment for $600 lies to the appellate court, rather than to the supreme court.—DURHAM V. STATE, Ind., 31 N. E. Rep. 787.

3. APPEAL IN CRIMINAL CASES—Bill of Exceptions.—In a criminal case it appeared that 12 jurors were empaneled. Defendant moved for a new trial on the ground that two of the jurors were discharged by the court, and the verdict was rendered by 10 only. The bill of exceptions stated that "defendant filed his motion and reasons for a new trial, which motion and reasons are as follows: [See transcripts from pages 9 to 17, inclusive.]" On said pages of the transcript was a copy of what purported to be an affidavit in support of said reason for a new trial, but the affidavit appeared nowhere else in the record: Held, that the affidavit could not be considered, since it was not embraced in the bill of exceptions, and there was no means of knowing that it was presented to the trial court.—TOWNSEND V. STATE, Ind., 31 N. E. Rep. 797.

4. ADMINISTRATION—Advancements.—A receipt under seal, executed by a daughter to her father, in which she acknowledges that she has received of him a specified sum as an advancement in full of her prospective share in his estate, both real and personal, at or after his death, and by which she relinquishes and forever quitclaims all her right, title, and interest in his estate, is a valid and binding contract, and after the death of the father intestate, leaving other heirs and distributees, will bar and estop the daughter from claiming or taking any part of his estate, in a contest with his administrator.—BARHAM V. MCKNEELY, Ga., 15 S. E. Rep. 761.

5. ADMINISTRATION—Right of Heir to Maintain Action.—An heir of a deceased owner of real estate cannot maintain an action with reference thereto until a decree of distribution has been rendered by the probate court in the administration of deceased's estate, unless special circumstances are alleged and proven showing that administration was unnecessary.—LAWRENCE V. BELLINGHAM BAY & B. C. R. CO., Wash., 30 Pac. Rep. 1099.

6. ADMINISTRATOR DE BONIS NON.—Pub. St. ch. 129, § 10, provides that "an executor of an executor shall not, as such, administer on the estate of the first testator:" Held, that this statute has no application to a case where an administrator *de bonis non* seeks to compel the administrator of a former administrator *de bonis non* of the same estate to at once turn over the assets of such estate before the disbursements and charges of such former administrator are first determined by the settlement of his account in the probate court.—FOSTER V. BAILEY, Mass., 31 N. E. Rep. 771.

7. ADMIRALTY — Bottomry Bond.—Where a charter party provides that, "if a vessel should be lost after discharge of outward cargo, one-half of this charter shall be considered due and payable," as after the completion of the outward voyage only one-half of the freight is still unearned, and so liable to be lost by reason of a maritime risk, only that portion of the total freight can then be hypothecated under a bottomry bond.—BRETT V. VAN PRAAG, Mass., 31 N. E. Reb. 761.

8. ASSAULT AND BATTERY—Damages.—If two persons engage voluntarily in a fight, either can maintain an action against the other to recover damages for the injuries he may receive.—GROTTEN V. GLIDDEN, Me., 24 Atl. Rep 1008.

9. BOND—Judgment in Attachment.—In an action upon a forthcoming bond, which recites a levy upon the property attached, it is not necessary for the plaintiff to introduce the attachment in evidence, provided he introduces the *fi. fa.* which issued upon the judgment recovered in the attachment case with a return of *nulla bona;* and, the *fi fa.* showing the amount so recovered, it is not necessary to introduce the judgment itself.—DOYAL V. JOHNS, Ga., 15 S. E. Rep. 776.

10. ATTACHMENT — Remedies — Replevin.—One whose property has been wrongfully seized under a writ of attachment, to which he is a stranger, is not confined to an action on the official bond of the sheriff, but may bring an action of replevin against him individually.—WISE V. JEFFERIS, U. S. C. C. of App., 51 Fed. Rep. 641.

11. ATTORNEY—Disbarment.—To authorize the disbarment of an attorney upon a charge of unlawfully and corruptly aiding, assisting, and counseling a justice of the peace to dismiss a prosecution pending before such justice against a third person for breaking and entering a dwelling house in the daytime with intent to commit a felony, the proof must be clear both as to the act charged against the attorney and his corrupt motive. Where there is conflict of testimony, there must be a clear preponderance against him.—STATE V. YOUNG, Fla., 11 South. Rep. 514.

12. ATTORNEY—Disbarment — Mandamus.—*Mandamus* is the appropriate remedy, upon a proper case, to restore an attorney at law to his rights as such, when disbarred by the judgment of a circuit court from practicing his profession; but in such proceedings it is

essential that the alternative writ, which takes the place of a declaration at law, should show a clear *prima facie* case in favor of the relator.—STATE v. FINLEY, Fla., 11 South. Rep. 500.

13. ATTORNEY AND CLIENT—Compensation.—Where an attorney contracts to serve his client for such a fee as the client may think reasonable, and be able to pay, the client, acting in good faith and according to his ability, is sole judge as to the reasonableness of the fee and his ability to pay.—HOWE v. KENYON, Wash., 30 Pac. Rep. 1058.

14. BILL OF EXCEPTIONS — Presumptions.—In an application to this court under section 5085, Comp. Laws, to settle a bill of exceptions, on the ground that the trial judge refuses to settle the same in accordance with the facts, every presumption is in favor of the correctness of the bill as settled by the trial judge, and it will stand, unless the attacking party affirmatively shows its incorrectness.—BAIRD v. GLECKLER, S. Dak., 52 N. W. Rep. 1097.

15. BONDS—Penalty—Measure of Damages.—Land was conveyed to an "assignee" of a cable railroad company as part of a bonus to aid its construction. A bond was executed by the assignee in a penalty equal to the value of the property conveyed, conditioned for the construction of the road. The road was not built, and the bond was sued on: Held, that the whole penalty could be recovered, as the value of the property was a proper measure of damages for the breach of the contract.—BLEWETT v. FRONT ST. CABLE RY. CO., U. S. C. C. of App., 51 Fed. Rep. 625.

16. CARRIERS — Live Stock Shipments.—Where a special contract for the shipment of live stock provides that the shipper shall go with the stock and care for it while in transit, he cannot recover for a failure to carry safely, without alleging and showing that the loss was not due to a breach of his own stipulations.—TERRE HAUTE & L. R. CO. v. SHERWOOD, Ind., 31 N. E. Rep. 781.

17. CARRIERS — Passengers—Evidence.—In an action against a railroad company for injuries to plaintiff, a passenger, caused by a car jumping the track, where the issue is whether plaintiff was injured at all, and the physicians disagree, evidence that the conductor of the train, who was in a seat near plaintiff at the time of the accident, was not injured, is admissible.—LEVY v. CAMPBELL, Tex., 20 S. W. Rep. 196.

18. CARRIERS—Passenger—Negligence.—Where plaintiff, in attempting to board a train as it is leaving a station, slips and is dragged along the platform and injured by falling into a ditch several yards distant which the railroad company is digging for the purpose of drainage, the negligent act of plaintiff in attempting to board the moving train is the proximate cause of the injury.—BAILEY v. CINCINNATI, N. O. & T. P. R. CO., Ky., 20 S. W. Rep. 198.

19. CARRIERS — Passengers—Rules of Company.—The law requires of railroad companies the exercise of the highest degree of care for the safety of passengers traveling upon their trains; and it authorizes such companies to make, and requires passengers to observe, all rules reasonably necessary, for the safety of the latter. A rule of a railroad company requiring that passengers shall remain in the cars provided for them, and, consequently, that they shall not ride in an express car, or other place of increased danger set apart for another purpose, is reasonable.—FLORIDA SOUTHERN RY. CO. v. HIRST, Fla., 11 South. Rep. 506.

20. CARRIERS—Use of Wharf.—A railroad company, owning a wharf extending into public navigable waters, maintained thereon a station and passenger depot, and used the wharf for its own line of steamers, in connection of its railroad traffic: Held, that a steamboat company, not a rival of the railroad company in its railroad business, was entitled to the use of the wharf, for a reasonable compensation, to the extent of receiving and discharging passengers and freight.—OREGON SHORT LINE & U. N. RY. CO. v. ILWACO RAILWAY & NAVIGATION CO., U. S. C. C. (Wash.), 51 Fed. Rep. 611.

21. CARRIERS OF GOODS—Negligence.—Where it does not appear either that the carrier received the goods as in bad order, or that they were in fact in bad order when received, the presumption is they were in good order.—HENRY v. CENTRAL RAILROAD & BANKING CO., Ga., 15 S. E. Rep. 757.

22. CEMETERIES — Dedication — Abandonment.—The city council of Youngstown, Ohio, by an ordinance passed in pursuance of the authority conferred by sections 20 and 23 of the Municipal Code of Ohio, as amended by the act of March 30, 1859, (56 Ohio Laws, 88), prohibited any further interments in certain lots within the city limits, which had been dedicated and used as a burying ground, and ordered the removal of all remains buried there: Held, that the ordinance was a valid exercise of the police power of the State, and binding on all the inhabitants of the city, and therefore operated as a complete abandonment of the dedicated use, such as would cause a reverter of the lands to the original owner or his heirs.—YOUNG v. BOARD OF COM'RS OF MAHONING COUNTY, U. S. C. C. (Ohio), 51 Fed. Rep. 585.

23. CHATTEL MORTGAGE—Lien—Agistment.—The lien of a chattel mortgage properly filed is paramount to that of an agister for subsequently pasturing the mortgaged stock, unless it is shown that the mortgagee consented, either expressly or impliedly, that such stock might be so pastured and subjected to such lien.—WRIGHT v. SHERMAN, S. Dak., 52 N. W. Rep. 1093.

24. CONSTITUTIONAL LAW—License— Drummer.—The revenue acts of 1891 made the occupation of "sample sellers and solicitors" a privilege, and all persons "selling goods, wares, or merchandise to consumers by sample or taking orders from consumers" were required to pay an annual license fee: Held that, in so far as such act applies to a non-resident drummer of a non-resident manufacturer, who sells by sample goods not within the State at the time of the sale, it is an attempt to levy a tax on interstate commerce, and in conflict with the United States constitution.—HURFORD v. STATE, Tenn., 20 S. W. Rep. 201.

25. CONTRACT—Abandonment.— Abandonment of an executory contract by plaintiffs, and acceptance thereof by defendant, constitutes a defense to an action on such contract.—HOBBS v. COLUMBIA FALLS BRICK CO., Mass., 31 N. E. Rep. 756.

26. CONTRACT—Damages.— Where a building is not erected within the time limited by the building contract, through the default or neglect of the contractor the owner is entitled to recover his damages thereby sustained. In such case it is not error for the owner to prove that the building had been leased for a stipulated sum, and that the tenant was to take possession as soon as the work was completed, where it is shown that the reasonable rental value exceeded the amount of rent reserved by the lease.— CONSAUL v. SHELDON, Neb., 52 N. W. Rep. 1104.

27. CONTRACT—Purchase of Land—Pleading.—To make an equitable plea setting up a parol contract for the purchase of land, and the performance of that contract, available against a subsequent vendee from the same vendor, the plea must allege that the first purchaser had possession of the premises when the second acquired his title, or that the latter had notice, actual or constructive, of the outstanding parol title, or that for some reason the second purchaser was not a *bona fide* purchaser for value. An equitable plea otherwise sufficient would not be available without making the vendor a party, if anything remained to be done to complete the performance of the contract on the part of the first purchaser.— HAMILTON v. WILLIFORD, Ga., 15 S. E. Rep. 753.

28. CONTRACT—Sale of Land. — A contract provided that C should have the exclusive sale of K's land for 60 days at a sum named, commissions to be obtained above that sum: Held, that C was thereby made the agent of K, and not given an option to purchase the land at the price named. — CHEZUM v. KREIGBAUM, Wash., 30 Pac. Rep. 1098.

29. COURTS—Adjournment.—When the superior court has been duly convened and adjourned over a certain day, the judge may, by an order passed before that day arrives, adjourn it over to a subsequent day, so as to carry to the latter a motion for a new trial previously set down to be heard on the former.—WHARTON V. SIMS, Ga., 15 S. E. Rep. 771.

30. CRIMINAL EVIDENCE—Res Gestæ.—On a trial for murder, evidence that, a few minutes after the shooting, deceased said that defendant shot her, is not admissible as part of the *res gestæ*.—PEOPLE V. WONG ARK., Cal., 30 Pac. Rep. 1115.

31. CRIMINAL LAW—Arguments of Counsel.—The court having promptly branded as improper the objectionable remarks made in counsel for the State in argument, and instructed the jury to disregard them, and it not being manifest to the supreme court that they produced any effect injurious to the accused, although they were calculated to do so, the denial of a new trial on the ground that such remarks were made will not be reversed; no motion having been made by the accused or his counsel to declare a mistrial, or to withdraw the case from the jury, on account of the objectionable remarks.—EDWARDS V. STATE, Ga., 15 S. E. Rep. 744.

32. CRIMINAL LAW—Arraignment.—A conviction of rape will be reversed where the record does not show that defendant was arraigned.—STATE V. TAYLOR, Mo., 20 S. W. Rep. 193.

33. CRIMINAL LAW—Burglary—Possession.—Where, in a trial for burglary, there is proof that part of the property stolen from the building at the time of the burglary was found soon thereafter in the possession of defendant, it is not error to refuse to direct a verdict of acquittal.—STATE V. OWSLEY, Mo., 20 S. W. Rep. 194.

34. CRIMINAL LAW—Perjury—Corroboration.—Where an indictment charges defendant with purjury committed on the trial of one K, proof that defendant at the preliminary examination of K gave testimony contradictory of that given by him on the trial is sufficient corroboration of a single witness as to the alleged perjury.—STATE V. BLIZE, Mo., 20 S. W. Rep. 210.

35. CRIMINAL PRACTICE—Arson.—An indictment for arson that charges that defendant burned a dwelling house, occupied by one W, and a storeroom and outbuildings, occupied by W and W Bros., all being the property of defendant, but then in the possession of the W's as tenants, the storehouse containing merchandise belonging to them, and that it was done feloniously, maliciously, and willfully, is sufficient.—COMMONWEALTH V. ELLISTON, Ky., 20 S. W. Rep. 214.

36. CRIMINAL PRACTICE—Bail—Murder.—In *habeas corpus* proceedings on the application of a person charged with murder for admission to bail, it appeared that, during several weeks prior to the killing, deceased had threatened to kill petitioner; that the latter's house was shot into in the night; that deceased and some of his associates, while armed, had hunted for him in the town where the parties resided; that deceased had expressed intense hatred of petitioner, and put him in such fear for his life that he had ceased to stay at home at night. On the morning of the killing, petitioner opened the door of the building where he had passed the night, and saw deceased on the walk. Petitioner had a shotgun in the house, and with it he shot deceased twice, instantly killing him. Deceased was armed at the time: Held, that the petitioner was entitled to be admitted to bail.—EX PARTE RANKIN, Tex., 20 S. W. Rep. 202.

37. CRIMINAL PRACTICE—Burglary.—An indictment charging defendant with willfully, forcibly, and feloniously breaking and entering a certain car, with intent to steal property therefrom, and naming the property stolen, is not defective in failing to charge that the entry was with intent to steal.—MILLER V. COMMONWEALTH, Ky., 20 S. W. Rep. 198.

38. CRIMINAL TRIAL—Arguments of Counsel—On the trial of an indictment for assault with intent to murder, though there be no direct evidence pointing distinctly to any specific motive, the solicitor general, in commenting on the evidence in his argument, may advance and urge any theory as to the motive which is not absolutely inconsistent with the facts and circumstances in proof; motive being pertinent, and inferences from circumstances being legitimate and proper means of arriving at it.—STERLING V. STATE, Ga., 15 S. W. Rep. 743.

39. CRIMINAL TRIAL—Competency of Juror.—Marriage relates the husband to the wife's kindred, but does not relate any of his kindred to hers. Consequently, a man whose brother had married the prisoner's sister was not, for that reason incompetent as a juror to try the prisoner for an offense.—BURNS V. STATE, Ga., 15 S. E. Rep. 748.

40. DAMAGES—Pleading.—Damages which necessarily result from the injury complained of may be recovered without any special statement of the same; and a motion to make the petition more "definite and certain," by stating in what manner the plaintiff has been damaged by the matters complained of, and by the nature and character of such damages, was properly overruled.—KINGSLEY V. BUTTERFIELD, Neb., 52 N. W. Rep. 1101.

41. DECEIT—Sale of Land.—In an action for damages sustained by plaintiff in an exchange of land, the complaint stated that defendants were partners in the business of buying and selling real estate; that plaintiff placed his farm in their hands for sale; that they finally proposed to buy the farm, and, as part payment, convey to plaintiff certain land in Kansas; that they made certain false and fraudulent representations concerning the Kansas land which were relied on by plaintiff, and by which he was induced to accept the land at a certain price; and that the land was worth much less than it would have been worth if it had been as represented: Held, that the complaint stated a cause of action.—WILLIAMSON V. WOTEN, Ind., 31 N. E. Rep. 791.

42. DEED—Construction.—A deed to a certain person "and her heirs" does not pass any title to the heirs as if the word "children" had been used, but "her heirs" are words merely of limitation.—PRICHARD V. JAMES, Ky., 20 S. W. Rep. 216.

43. DEED—Construction.—Where husband and wife execute a warranty deed of the husband's property which contains the usual words of grant, followed by a clause, "intending hereby to convey absolutely" all the interest of the wife in the property, such clause is mere surplusage, and does not limit the estate conveyed to the inchoate interest of the wife.—DAVENPORT V. GWILLIAMS, Ind., 31 N. E. Rep. 791.

44. DEED—Easements—Construction.—The owner of land fronting on a river conveyed a strip across the same to a railroad company, reserving the right to cross such strip at any place. The deed provided that the railroad company should lay its tracks so that the top of the rails should be on the level of the ground, and that it should secure water pipes crossing the strip: Held, that such reservation created a permanent easement in favor of the unconveyed portion, not limited to the life of the original owner, but passed with a conveyance of the premises.—CHAPPELL V. NEW YORK, N. H. & H. R. Co., Conn., 24 Atl. Rep. 997.

45. EMINENT DOMAIN—Ejectment.—Where a city takes possession of private lands, and constructs a street and street railway thereon, in the absence of the owner and without her knowledge, consent, or acquiescence, she can thereafter maintain an action for the recovery thereof, notwithstanding the public use.—GREEN V. CITY OF TACOMA, U. S. C. C. (Wash.), 51 Fed. Rep. 622.

46. EQUITY—Dismissal—Costs.—Under the common law, where an action is dismissed for want of prosecution, at the costs of the plaintiff, the plaintiff is required to pay such costs before prosecuting a second action for the same cause. In equity procedure, however, this rule is not enforced. A court of equity will be governed by the circumstances of each case, and,

where there is a valid excuse given for the failure to pay the costs in the former suit, will not compel such payments as a condition of permitting the second to proceed.—UNION PAC. R. CO. v. MERTES, Neb., 52 N. W. Rep. 1099.

47. EVIDENCE — Judicial Notice — Public Lands.—The court will take judicial notice of the fact that patents for public lands are frequently dated several years after the payment of the purchase money and the issuance of the certificate of entry, and therefore the production of a patent dated in 1888 is no proof that the patentee did not have an interest in the lands which was subject to attachment and judicial sale in 1885.—BIGELOW v. CHATTERTON, U. S. C. C. of App., 51 Fed. Rep. 614.

48. EXPERT TESTIMONY — Hypothetical Questions.—Whereas, an expert may not be interrogated upon an hypothesis having no foundation in the evidence, it is yet not necessary that the hypothetical case put to him should be an exact reproduction of the evidence, or an accurate presentation of what has been proved. Counsel may present an hypothetical case in accordance with any reasonable theory of the effect of the evidence; and, if the jury find that the facts on which his hypothesis or theory of the effect of the evidence is based are not proved, the answer of the expert necessarily falls with the hypothesis.—BAKER v. STATE, Fla., 11 South. Rep. 492.

49. FEDERAL COURTS—District Attorneys—Fees —Rev. St. U. S. § 824, provides that a district attorney shall be allowed five dollars a day for the time necessarily employed in examining, before a judge or commissioner, a person charged with crime, and "for each day of his attendance in a court of the United States, of the business of the United States, $5" Section 831 provides that, "when the circuit and district courts sit at the same time," he shall be allowed only for attendance on one court: Held, that a district attorney who is in attendance upon a federal court, and also on the same day conducts the examination, before a commissioner, of a person charged with crime, is entitled to only one *per diem* fee for the day.—BAXTER v. UNITED STATES OF AMERICA, U. S. C C. of App., 51 Fed. Rep. 671.

50. FEDERAL COURTS—Jurisdiction —A suit in a federal court against an executor, to recover a legacy, wherein a receiver of a national bank which held assets of the estate is party defendant, will be dismissed, on demurrer, as to the executor for want of jurisdiction, when all the parties are citizens of the same State.—WARDENS, ETC., ST. LUKE'S CHURCH v. SOWLES, U. S. C. C. (Vt.), 51 Fed. Rep 609.

51. FEDERAL COURTS—Suits in Indian Territory.—In actions in the federal courts in the Indian Territory, the rule of decision, in the absence of statute, or of proof of the laws, rules, or customs prevailing in the territory, is the common law, since it is the *lex fori*.—PYEATT v. POWELL, U. S. C. C. of App., 51 Fed. Rep 551.

52. FRAUDS, STATUTE OF —A contract to build for defendant a dwelling house on his wife's land, and sell it to him, is not within Gen St § 2019, providing that no action shall be brought to charge any person on "any contract or sale of lands, unless the agreement upon which such action shall be brought, or some note or memorandum thereof, shall be in writing;" and oral evidence by defendant is admissible to establish such contract in defense of an action for building a bake oven claimed by him to be included in such agreement.—COLEMAN v. CURTIS, S. Car , 15 S. E. Rep 709.

53. FRAUDS, STATUTE OF.—Gen. St. § 2019, (Statute of Frauds, § 4), provides that no action can be brought to charge any person on any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing Section 2017 provides that all estates, interest of freehold or term of years, created by parol, shall be estates at will only, except leases for less than one year, wherein the rent for the time shall amount to two-thirds or more of the value of the thing demised: Held, that no action will lie to charge any person on a parol contract for the lease of real estate, even for a term less than a year, no matter what may be the rent reserved therein—DAVIS v. POLLOCK, S. Car., 15 S E Rep. 718.

54. GARNISHMENT—Foreign Corporations.—Under Rev. St. Ohio, §§ 5532, 5534, a non-resident corporation, doing business in the State, and having a managing agent there, is subject to garnishee process, equally with a domestic corporation.—RAINEY v. MAAS, U. S. C. C., (Ohio), 51 Fed Rep. 580.

55. HOMESTEAD—Head of Family.—On an application by defendant for the admeasurement of a homestead, it appeared that he and his family lived on the land in dispute until his dwelling house was burned. While building another house on the land, the family temporarily resided elsewhere. During this period defendant's wife had an orphan boy who lived with them died, leaving only defendant and his wife's niece, whom they had informally adopted, remaining of the persons formerly comprising the family: Held, that defendant was the head of a family, and entitled to the exemption of a homestead.—FANT v. GIST, S. Car., 15 S. E. Rep. 721.

56. JUDGMENT—Collateral Attack.—A judgment cannot be attacked by a stranger to the action on the ground that the admission of service was defective.—MARTIN v. BOWIE, S Car., 15 S. E Rep. 736.

57. JUDGMENT—Equitable Relief.—Where it appears that plaintiff was duly summoned to appear and show cause why a judgment should not be revived against him, and he was not prevented from appearing thereto by fraud, accident, or mistake, equity will not restrain the enforcement of the judgment on the ground that it was paid before revival.—SULLIVAN v. SHELL, S. Car , 15 S. E. Rep 722.

58. JUSTICE OF THE PEACE—Disqualification.—When a notary public, who is *ex officio* justice of the peace, is disqualified or refuses to serve in a given case, or his term of office has expired after an appeal from his judgment has been entered, the other justice of that district may preside in a trial of the appeal before a jury, especially when neither of the parties, before verdict, makes any objection to his so presiding.—HARRISON v. PERRY, Ga., 15 S. E Rep. 742.

59. LANDLORD AND TENANT—Nuisance.—A grantee of premises subject to a lease is not liable for a nuisance created and continued by the tenant of the grantor, if such grantee had no power to abate the nuisance.—LUFKIN v. ZANE, Mass., 31 N. E. Rep. 757.

60. MARRIAGE—Legitimacy of Issue.—A marriage in 1843, between a free negro and a female slave, was a nullity, and the children of such marriage are illegitimate as to the father, unless they are acknowledged by the father, and thereby ligitimated, as provided by Enabling Act 1865, § 4.—CALLAHAN v. CALLAHAN, S. Car., S. E Rep. 727.

61. MARRIAGE OF DIVORCED PERSONS.—Under section 2008 of the Code of 1881, providing that, after granting a divorce, "neither party shall be capable of contracting marriage with a third person until the period allowed for an appeal has expired," where two persons, divorced from their former spouses, intermarry within the time so allowed, there is no lawful marriage, and the woman is not entitled, as widow, to letters of administration upon the estate of the other deceased.—IN RE SMITH'S ESTATE, Wash., 30 Pac. Rep. 1059.

62. MASTER AND SERVANT—Fellow-servants.—Plaintiff, a carpenter employed by the hour, was sent by his master to repair defendant's elevator under the direction of defendant's superintendent, and while executing the repairs was injured by the carelessness of the elevator boy. The superintendent, in plaintiff's presence, warned the boy of plaintiff's duties, and to use special care: Held, that plaintiff, for the purpose of making the repairs, was defendant's servant and in a common employment with the elevator boy, and had assumed the ordinary risks thereof, one of which was the boy's carelessness.—HASTY v. SEARS, Mass., 31 N. E. Rep. 759.

63. MASTER AND SERVANT—Negligence—Defective Appliances.—The duty of a railroad company to furnish its employees with safe and reliable machinery and appliances adequate to the services in which they are engaged cannot be delegated to another servant so as to exempt itself from liability for injuries caused by its omission. Nor will the negligence of a fellow-servant excuse the company from liability to a co-servant for an injury which would not have happened had the proper machinery been furnished.—NORTHERN PAC. R. CO. v. CHARLESS, U. S. C. C. of App., 51 Fed. Rep. 562.

64. MASTER IN CHANCERY—Findings.—On an issue as to whether a certain transaction was an absolute sale or a pledge, a finding by the master that, "upon all the testimony in the case, I am of the opinion that the transaction was a pledge," is not a conclusion of law, but a fact found from the evidence.—MORRELL v. KELLY, Mass., 31 N. E. Rep. 755.

65. MECHANICS' LIENS — Materials. — Under Gen. St. Wash. § 1663, providing that every person furnishing materials to be used in the construction of any building shall have a lien therefor, whether furnished at the instance of the owner of the building or his agent, a mechanic's lien cannot be maintained against the owner of a building for materials used in its construction that were furnished the contractor in his own name, when plaintiff had no knowledge of any contract relations existing between the contractor and owner, nor of the particular building to be constructed, but intended to hold whatever building the materials were used in, as security.—WHITTIER v. PUGET SOUND LOAN, TRUST & BANKING CO., Wash., 30 Pac. Rep. 1094.

66. MORTGAGE.—To make a *prima facie* case against the claimant in favor of the plaintiff in mortgage *fi. fa.*, it is not sufficient to prove possession of the mortgaged property by the mortgagor at the time of the levy, but either possession or title in the mortgagor at the date of the mortgage must be shown.—MORRIS v. WINKLES, Ga., 15 S. E. Rep. 747.

67. MORTGAGES—Power of Sale.—To render the execution of a power of sale contained in a mortgage valid, the deed of sale must be signed in the name of the mortgagor.—DENDY v. WAITE, S. Car., 15 S. E. Rep. 712.

68. MORTGAGE ON WIFE'S SEPARATE PROPERTY. — A joint mortgage by a man and his wife on the separate farms of each, which recites that it is given for supplies and advances for both farms, is not void as to the separate farm of the wife.—NEAL v. BLECKLEY, S. Car., 15 S. E. Rep. 733.

69. MUNICIPAL CORPORATIONS—Defective Streets.—By its charter, the city of Portland is declared not to be liable to any one for an injury resulting from a defective condition of the streets; but any officer thereof who by his "willful neglect" thereabout, of a duty enjoined by law, causes such injury, is so liable.—BALLS v. WOODWARD, U. S. C. C. (Oreg.), 51 Fed. Rep. 646.

70. MUNICIPAL CORPORATION — Pollution of Water Course.—Under the charter of New Britain, as amended in 1872, providing that, before using a stream for sewer purposes, the damage suffered by any individual must be ascertained and paid, and prescribing the method for ascertaining such damage, an allegation by a defendant city, in an action for damages, that, in using a stream for sewer purposes, it has proceeded under the act, is insufficient. — KELLOGG v. CITY OF NEW BRITAIN, Conn., 24 Atl. Rep. 996.

71. NEGOTIABLE INSTRUMENT—Estoppel.—In a suit on a note signed by defendant as surety for a third person, to whom plaintiff was about to make a loan, defense was made that the note was altered without defendant's consent by the addition of a clause providing that it should bear interest at 8 per cent. It appeared that, when plaintiff's agent was about to pay the money on the note, he observed the absence of any interest clause, and told defendant and the borrower that, under his principal's instructions, he could not pay the money unless there was a provision for interest at 8 per cent; and the interest clause was then added by the borrower, in the presence of defendant, who raised no objection, and the money was then paid: Held, that defendant was estopped from denying his consent to the alteration.—SANDERS v. BAGWELL, S. Car., 15 S. E. Rep. 714.

72. NEGOTIABLE INSTRUMENT—False Representations—Subscription.—To an action upon promissory notes given to a railroad company as a subscription for stock therein, pleas to the effect that the company's agent who procured the subscription did so by representing that the road would be economically built, that the stock would be a good investment and would pay dividends, and by making other like representations, and that all these representations proved to be untrue, set forth no valid defense, and were properly stricken on demurrer.—WESTON v. COLUMBUS SOUTHERN RY. CO., Ga., 15 S. E. Rep. 773.

73. NEGOTIABLE INSTRUMENT — Indorsement. — The payee of a negotiable promise in writing, who transfers the same by indorsement, thereby guaranties both the genuineness of the writing and the validity of the promise.—WILLIS v. FRENCH, Me., 24 Atl. Rep. 1010.

74. NEW TRIAL— Discretion of Court.—The first grant of a new trial will not be reversed unless it plainly and manifestly appears that there was an abuse of discretion by the court below; and this court will not closely scrutinize the facts in evidence, or endeavor to balance with great exactness the testimony on both sides, with a view to detecting an abuse of discretion by the trial judge.—GEORGIA MIDLAND & G. R. CO. v. CURRY, Ga., 15 S. E. Rep. 751.

75. OFFICER — Removal. — Pen. Code, § 770, provides that from a judgment of removal from office "an appeal may be taken to the supreme court in the same manner as from a judgment in a civil action; but, until such judgment is reversed, defendant is suspended from his office. Pending the appeal, the office must be filled as in case of a vacancy:" Held that, where a judgment removing a justice of the peace from office for willful misconduct therein is reversed on appeal, the justice is entitled to his salary during the period of removal, though another has filled the vacancy and been compensated therefor.—WARD v. MARSHALL, Cal., 30 Pac. Rep. 1113.

76. OFFICERS — State —The members of the board of construction are "officers," within Organic Act, § 7, providing that "the governor shall nominate, and, by and with the advice and consent of the legislative assembly, appoint, all officers not herein otherwise provided for," and so much of the act creating the board as assumes to appoint its members is invalid.—MCCORNICK v. PRATT, Utah, 30 Pac. Rep. 1090.

77. PRACTICE — Dismissal— Summons. — Under Civil Code § 33 (Sess. Laws 1887, p. 104), which provides that at any time within one month after filing the complaint plaintiff may have a summons issued, the action will be dismissed unless the summons is issued within such time.— STEVES v. CARSON, Colo., 30 Pac. Rep. 1101.

78. RAILROAD COMPANIES— Negligence —In an action against two railroad companies to recover for personal injuries sustained in a collision at a crossing of their tracks, a verdict was rendered against one company and in favor of the other: Held, that the former could not complain that the verdict in favor of the latter was contrary to the evidence, for, if itself guilty of negligence contributing to the injury, it was liable for the entire damages.—KANSAS CITY, FT. S. & M. R. CO. v. STONER, U. S. C. C. of App., 51 Fed. Rep. 649.

79. RAILROAD COMPANIES — Negligence. —One who, without permission, has cut cord wood from public lands, and piled it along a railroad, and who is in actual possession thereof, and engaged in selling it for his own benefit, may recover its full value, if negligently destroyed by fire from a locomotive; for the railroad company cannot justify its negligence by showing that the plaintiff was a trespasser, or question his title without connecting itself with the true title. — NORTHERN PAC. R. CO. v. LEWIS, U. S. C. C. of App., 51 Fed. Rep. 658.

80. RAILROAD COMPANIES—Negligence.—In an action against a railroad for injuries to a brakeman caused by a defect in a brake, plaintiff alleged that the defect was unknown to him, while it was known to defendant, and defendant alleged that it was plaintiff's duty to inspect the brake; that defendant had no knowledge of the defect, nor means of knowledge, and that plaintiff both had the means of knowledge and was bound to know of it. The jury returned a general verdict for plaintiff, and also gave answers to various special interrogatories: Held, that the general verdict for plaintiff was in effect a finding that there was negligence on the part of defendant, that the defect in the brake was not a risk which plaintiff assumed as incident to his employment, and that plaintiff had no knowledge of the defect in the brake; and on these points this finding was conclusive, in the absence of special findings utterly irreconcilable therewith. — MATCHETT v. CINCINNATI W. & M. RY. CO., Ind., 31 N. E. Rep. 792.

81. RAILROAD COMPANIES— Unlawful Obstruction of Alleys.—The owner of a business stand abutting upon a public alley sustains special damage,—that is, damage not shared in by the public at large,—if, by the illegal obstruction of the alley, customers are prevented from having and using the same as a means of access to the stand, for the purposes of trade, as they have been habitually doing for many years previously.—HARVEY V. GEORGIA SOUTHERN & F. R. CO., Ga., 15 S. E. Rep. 783.

82. RAILROAD COMPANIES—Use of Another's Track.—A railway company permitting, by contract or otherwise, another railway company to use a section of its main line, not at a terminal point, but to reach such point, is liable to one of its own employees for a personal injury resulting to him from the negligence of the latter company in running its train over and upon the section used in common by both companies; it not appearing that the negligent company had any legislative authority to adopt and use as its own any part of the main line of the other company. In such case, both companies should be considered as using the franchise of the one owning the line, and the principle of Railroad v. Mayes, 49 Ga. 355, applies.— CENTRAL RAILROAD & BANKING CO. V. PASSMORE, Ga., 15 S. E. Rep. 760.

83. REFERENCE — Master's Report.—Where a case is referred to a master "to take testimony as to the amount, if any, due" on a mortgage, "and report the same to the court," a report by the master that the mortgage was procured by fraud, and recommending that it be canceled and the complaint dismissed, is properly set aside, as not responsive to the order of reference, and sent back to the master.— CONNOR V. EDWARDS, S. Car., 15 S. E. Rep. 706.

84. REPLEVIN AND DETINUE—Pleading.—The distinction recognized at common law, between the action of replevin and detinue, does not exist in this State, as the Code, having abolished all forms of pleading existing prior to the Code, necessarily abolished the distinction between these actions; and the action to recover personal property takes the place of, and is a substitute for, both the former actions of replevin and detinue.—WILLIS V. DE WITT, S. Dak., 52 N. W. Rep. 1090.

85. SALE— Bona Fide Purchaser.—Where defendant purchased a horse for valuable consideration from one having possession under a bill of sale executed by plaintiff as a security for debt, he will be protected, as against plaintiff, in an action to recover the horse, on its appearing that he had no notice of plaintiff's claim.—FOLK V. SAUNDERS, S. Car., 15 S. E. Rep. 732.

86. SALE OF REAL ESTATE— Purchase Money.—Where time is of the essence of a contract for the sale of land, a failure by the vendor to tender a deed until after the time limited for performance does not constitute an abandonment of the contract so as to enable the purchaser to maintain an action to recover the part of the purchase money paid.—BRADFORD V. PARKHURST, Cal., 30 Pac. Rep. 1106.

87. SALE OF SHARES OF STOCK.—Where the purchaser of shares of stock to be issued by a mining corporation pays the purchase price, and the corporation is prevented by an injunction from issuing the stock so that the vendor cannot perform his contract, the purchaser, after waiting a reasonable time and making demand for the repayment of the purchase money, may maintain an action therefor against the vendor's administrator.—ROSE V. FOORD, Cal., 30 Pac. Rep. 1114.

88. SCHOOL TAXES.— Rev. St. 1881, §§ 4467, 4468, provide that the trustees of cities shall have the power to levy a special tax therein for school purposes, within certain limitations, and make it the duty of the county auditor to make the proper assessment of special school tax levied by the trustees, and extend the same on the tax duplicate: Held, that such trustees have the exclusive right to determine the amount of and make such levy within the limits prescribed without any action by the board of commissioners of the county, since the latter are not charged with any duty relating to the levy or assessment of such tax.—WOOD V. SCHOOL CORPORATION OF CITY OF TIPTON, Ind., 31 N. E. Rep. 799.

89. SHIPPING—Damage—Bill of Lading.—Where a ship gives a bill of lading reciting that the goods were received on board "in good order and condition," and afterwards delivers them in a damaged condition, the burden is on her to show that the damage arose from an excepted peril; and, if she is unable to explain the cause of the damage, she is liable.—THE MASCOTTE, U. S. C. C. of App., 51 Fed. Rep. 605.

90. SUMMONS— Personal Service—Collateral Attack.—Where a non-resident was personally served with summons in a State court, while within the jurisdiction of such court, solely for the purpose of trying another suit pending in said court as party defendant, and the court held the service good, and gave judgment thereon, such service cannot be collaterally attacked in a subsequent suit on the judgment in a federal court.—CAPWELL V. SIPE, U. S. C. C. (Ohio), 51 Fed. Rep. 667.

91. TAXATION FOR SCHOOL PURPOSES.—The board of trustees of a civil town having no authority to levy a tax for a special school fund, such unauthorized levy cannot be legalized by ratification by the board of trustees of the school town.—SHEPARDSON V. GILLETT, Ind., 31 N. E. Rep. 788.

92. VENDOR AND PURCHASER — Marketable Title. — Where, in a contract for the sale of real estate, there is no stipulation to the effect that the premises shall be free from any incumbrance or cloud, the vendor is only bound to tender a marketable title.—RIFE V. LYBARGER, Ohio, 31 N. E. Rep. 768.

93. VENDOR AND PURCHASER—Vendor's Lien.—Where the vendor of real estate retains the title until the purchase money is paid, and executes to the vendee a bond for a deed at a future day, no equitable lien on the property in favor of the vendor is created; the lien, if any, is one of contract. — SHELTON V. JONES, Wash., 30 Pac. Rep. 1061.

94 VENDOR'S LIEN—Liability of Second Purchaser.—Where the purchaser of real estate receives notice that his vendor has not paid therefor, before he pays the purchase money, he takes the land subject to the prior vendor's lien to the extent of the purchase money unpaid by him, although he had no knowledge of such lien at the time he purchased.—COMBINATION LAND CO. V. MORGAN, Cal., 30 Pac. Rep. 1102.

95. WILLS— Construction. — Testator, after making various pecuniary bequests, gave to his son and daughter, "all the balance or residue of his estate, real and personal." After payments of debts and costs of administration, there was not sufficient personal estate left to pay the bequests: Held that, as testator's real estate was not specifically devised, but merely included in the residuary clause, it was his intention to make the bequests a charge thereon, and it was the administrator's duty to sell the real estate for the purpose of paying the bequests.—AMERICAN CANAL COAL CO. V. CLEMENS, Ind., 31 N. E. Rep. 786.